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ABSTRACT

This document presents an overview of the basis for the program requirements applicable to local school districts applying for grants under Title I of the Elementary and Secondary Education Act of 1965. The study's basic research objective is to determine what additions, deletions, or clarifications are needed within the Title I legal framework to improve program administration. The purpose of this introductory overview is to summarize the project's major findings, conclusions and recommendations concerning: (a) the basis for the requirements with which Local Educational Agencies(LEAs) must comply in order to receive benefits under Title I, (b) whether the language of the federal legal framework in effect during the interviews setting forth the basic LEA program requirements is sufficiently clear, (c) whether those basic LEA program requirements restrict LEAs in the design of innovative programs for, and the delivery of services to, educationally deprived children residing in low-income areas, (d) whether the legal frameworks developed by the states are sufficiently clear and whether they restrict the design of innovative programs, and (e) whether the revised Title I regulations published in the Federal Register subsequent to the date of the interviews address the problems identified by the project concerning the clarity and restrictiveness of the earlier Title I legal frameworks. This paper includes an introduction and the project's findings, conclusions, and recommendations concerning the basis for, clarity, and restrictiveness of the program requirements applicable to local school districts applying for grants under Title I. (Author/AM)

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AN INTRODUCTORY OVERVIEW CONCERNING THE BASIS FOR AND CLARITY AND RESTRICTIVENESS OF THE PROGRAM REQUIREMENTS APPLICABLE TO LOCAL SCHOOL DISTRICTS APPLYING FOR GRANTS UNDER TITLE I OF ESEA

Prepared by

The Legal Standards Project

Robert Silverstein,
Project Director

Rosemary Batt
F. Lorraine Bodi
Michael Gaffney
Patricia J. Gauvey
David Long
Carol Morgan
Randall Robinson
Daniel M. Schember
Catherine M. Thomas

Lawyers' Committee For Civil
Rights Under Law

733 15th Street, N.W.
Washington, D.C. 20005
202-628-6700

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PART I

INTRODUCTION AND OVERVIEW OF THE PAPER

PART I
INTRODUCTION AND OVERVIEW OF THE PAPER

I. Purpose of the Paper

On April 11, 1965, Congress enacted the Elementary and Secondary Education Act[1] (ESEA) which was designed to expand educational opportunities in the nation's elementary and secondary schools. "Title I"[2] of that Act provides financial assistance to local educational agencies[3] (LEAs) to meet the special educational needs of educationally deprived children residing in areas having high concentrations of children from low-income families. Later amendments have "set aside" certain amounts of Title I funds for handicapped children,[4] Indian children,[5] agricultural migrant children,[6] children in institutions for the neglected and delinquent children,[7] and children of migratory fishermen.[8]

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[1] P.L. 89-10 (20 U.S.C. 241a *et. seq.*)

[2] "Title I" of ESEA was originally designated "Title II" of P.L. 81-874 (1950) pertaining to Federal aid to impacted areas. In January, 1968 Congress redesignated the enabling legislation as Title I of ESEA.

[3] The term "local educational agency" means a "public board of education or other public authority legally constituted within a state for either administrative control or direction of, or to perform a service function for, public elementary or secondary schools in a city, county, township, school district or other political subdivision of a State, or such combination of school districts or counties as are recognized ina State as an administrative agency for its public elementary or secondary schools . . ." Section 403 (6)(B) of P.L. 81-874.

[4] P.L. 89-313 (November 1, 1965).

[5] P.L. 89-750 (November 3, 1966).

[6] *Id.*

Congress, in the Education Amendments of 1974 (1974 Amendments), extended the Title I program through June 30, 1978. The 1974 Amendments also mandated that the National Institute of Education (NIE) undertake a study of compensatory education programs, including Title I and report the findings to Congress with recommendations concerning future federally funded compensatory and remedial education programs.

One aspect of the NIE study is an examination of the administration of Title I by the states.[9] This is an important subject because the Title I statute confers major responsibilities for the administration of Title I on State Educational Agencies[10] (SEAs). Central to the study of program administration and to any conclusions concerning the future of federal compensatory education efforts is an understanding of the legal framework of Title I. This legal framework includes program requirements which specify how Title I programs are to be designed and how federal funds are to be used by LEAs which receive Title I funds, thereby defining the objectives of Title I program administration. The legal framework also includes the respective functions which SEAs and the United States Office of Education (OE) are to perform in the administration of Title I. The National Institute of Education has contracted with the Lawyers' Committee for Civil Rights Under Law to conduct the "Compensatory Education Study - Survey of Legal Standards" (Legal Standards Project) which is to describe and analyze the legal framework of Title I and State compensatory education programs.

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[7] Id.

[8] P.L. 93-380 (August 21, 1974).

[9] Section 821 of the 1974 Amendments (20 U.S.C. 1221c note). See Research Plan: Compensatory Education Study (December 16, 1974) National Institute of Education.

[10] The term "State educational agency" means the officer or agency primarily responsible for the state supervision of public elementary and secondary schools. Section 403(7) of P.L. 81-874.

The study's basic research objective is to determine what additions, deletions, or clarifications are needed to the Title I legal framework to improve program administration. To satisfy this basic research objective, our contract with NIE provides for the preparation of several policy papers.

The first paper analyzes the basis for and clarity and restrictiveness of the program requirements applicable to LEAs applying for grants under Title I.[11] The paper is divided into three parts. The first part describes, among other things, the purpose of the paper, definitions of the major terms used in the paper, and the limitations of the paper. The second part of the paper includes our general findings, conclusions, and recommendations concerning the basis for and clarity and restrictiveness of the major LEA program requirements.

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[11] "An Analysis of the Basis for and Clarity and Restrictiveness of the Program Requirements Applicable to Local School Districts Applying for Grants Under Title I of the Elementary and Secondary Education Act of 1965" (approximately 850 pages).

Part three of the paper analyzes the major LEA program requirements. The analysis of each requirement includes: (a) an overview of the federal legal framework, i.e., the relevant sections of the Title I and GEPA statutes, the Title I and GEPA regulations, Title I guidelines, handbooks, Program Reviews, and OE correspondence with LEAs; (b) the purpose of the requirement, including references to relevant portions of the legislative history; (c) a description of the state policies and procedures interpreting and clarifying the federal legal framework; and (d) an analysis of the federal and state legal frameworks, including relevant findings, conclusions, and recommendations from this study.

A second paper analyzes the clarity and sufficiency of the sections of the Title I legal framework prescribing the administrative responsibilities SEAs must perform.12/

A third paper analyzes the relationship between Title I and selected state compensatory education programs.13 /

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12 / "An Analysis of the Legal Framework for State Administration of Title I of the Elementary and Secondary Education Act of 1965" (approximately 500 pages).

13 / "A Description and Analysis of the Relationship Between Title I, ESEA and Selected State Compensatory Education Programs" (approximately 300 pages).

A fourth paper describes the sections of the Title I legal framework prescribing (a) the requirements local districts must satisfy, (b) the functions States must perform, and (c) the functions the Commissioner must perform. This description incorporates changes made to the Title I regulations on September 28, 1976.[14]

The purpose of this introductory overview is to summarize the Project's major findings, conclusions and recommendations concerning (a) the basis for the requirements with which LEAs must comply in order to receive benefits under Title I (LEA program requirements); (b) whether the language of the federal legal framework in effect during our interviews[15] setting forth the basic LEA program requirements is sufficiently clear, i.e., do those responsible for fulfilling the requirements understand the full range of acceptable and unacceptable practices under Title I; (c) whether those basic LEA program requirements restrict LEAs in the design of innovative programs for, and the delivery of services to, educationally deprived children residing in low-income areas; (d) whether the legal frameworks developed by the states are sufficiently clear and whether they restrict the design of innovative programs; and (e) whether the revised Title I regulations published in the Federal Register[16] subsequent to the date of our interviews address the problems identified by the

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[14] "A Description of the Title I, ESEA Legal Framework" (approximately 200 pages).

[15] As will be explained infra, the regulations in effect during our interviews were superseded by a new set of regulations published in the Federal Register on September 28, 1976.

[16] 41 FR 42895-42923 (September 28, 1976).

Project concerning the clarity and restrictiveness of the earlier Title I legal framework. These findings, conclusions and recommendations are discussed at greater length in Part III of the first paper described above.

For purposes of this paper, a requirement is considered to be "unclear" if the full range of acceptable and unacceptable practices under Title I cannot be comprehended by thoughtful consideration of the language of the provision and its context in the statute or regulations.

For purposes of this paper, a requirement is considered "overly restrictive" if, although consistent with the Title I statute and legislative history, it places burdens on LEAs not necessary to accomplish the stated policy.

II. Limitations of This Paper

There are several aspects of the Title I legal framework which are not considered either in this paper or elsewhere in the Lawyers' Committee study. First, this study does not describe or analyze those requirements pertaining to Title I programs funded from special Title I "set asides" for handicapped children, Indian children, agricultural migrant children, children of migratory fishermen, or children in state institutions for neglected and delinquent children. Nor does this study consider those sections of the legislation and regulations which do not pertain directly to requirements which LEAs must meet or to functions which SEAs and OE are required to perform under Title I, e.g., special incentive grants, and the establishment of a National Advisory Council for the Educationally Disadvantaged. Further, we do not analyze the legal requirements concerning the operation of Title I programs in private schools. Each of these areas, though relevant, is beyond the scope of this study.

The Legal Standards Project was not asked to analyze the feasibility of developing alternatives to the basic policies and categorical aid structure of the existing Title I legal framework. We were not asked to analyze, for example, (a) the advantages and disadvantages of repealing Title I and enacting block grant legislation, or (b) the Title I policy of targeting only those areas in a school district having high concentrations of children from low-income families. Instead, our task was to analyze the basis for and the clarity and restrictiveness of the existing Title I legal framework.

To the extent a statutory provision is unclear or overly restrictive, we propose appropriate modifications, additions or deletions. Similarly, to the extent we found that an OE requirement was inconsistent with the Title I statute, unclear or overly restrictive, we recommend changes to ameliorate such problems.

We propose no changes to regulations found to be consistent with the statute, clear and non-restrictive, even though an alternative interpretation might also be consistent with the statute and legislative history. For example, since 1968 OE regulations have defined "areas having high concentrations of children from low-income families" as those areas having a percentage or number of children from low-income families as high or higher than the district-wide average. Since the standard is clear, and, when read in conjunction with other provisions in the regulations, not overly restrictive given the less than full funding of Title I, we have not recommended that OE adopt an alternative definition, although other definitions might also be consistent with the Title I statute.

In certain cases, the limitations of our expertise or the need for empirical data prevented us from making specific recommendations. In such cases, we have limited our role to identifying issues requiring further analysis and decisions by others.

We did not study in depth the activities of the HEW Audit Agency (HEWAA) regarding Title I. On several occasions, though, SEAs and LEAs expressed to us the opinion that HEW auditors had made unnecessarily restrictive interpretations of the law. It is important that the merits of these contentions be studied. In this paper we offer certain hypotheses concerning these contentions, infra, at p. 72; but the perspective of the HEW

Audit Agency is a subject that will be addressed by other NIE grantees and, thus, is not explored here.

With respect to our analysis of the states' legal frameworks, it is important to note that our study is only concerned with state policies. Whether a particular state policy is diligently enforced in actual practice is beyond the scope of the project. This limitation is not, for our purposes, a deficiency. The analysis of state policies offers valuable insights concerning the variety of possible interpretations of the federal requirements. It is also a source of ideas for improving those requirements.

This introduction and overview does not analyze in detail any particular Title I requirement. Such an analysis appears in Part III of the Project's paper, "An Analysis of the Basis For and Clarity and Restrictiveness of the Program Requirements Applicable to Local School Districts Applying for Grants Under Title I of the Elementary and Secondary Education Act of 1965."[17]

III. Research Methodology

To achieve our basic research objectives, the Legal

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[17] For the convenience of the reader, the table of contents pertaining to Part III is reproduced in Appendix A of this paper.

Standards Project studied the federal Title I legal framework and the Title I legal frameworks of ten states.

The states selected by NIE and the Legal Standards Project included: (a) states which have enacted state compensatory education programs; (b) approximately one state from each of the HEW regions; (c) at least one state from each of the following categories -- large urbanized, large rural, small urbanized, small rural; (d) states which had actively interpreted Title I and states that had not; (e) states that have been cited as having model systems for the administration of Title I, and (f) states which have been severly criticized by OE and HEWAA.

The Project reviewed written policy statements developed by the states, and preliminary determinations were made concerning, among other things, (a) the substance and extent of state regulation, and (b) the comprehensiveness, internal consistency, and specificity of these state regulations, and their consistency with the federal legal framework.

In addition to studying the states' legal frameworks, we spent approximately one week in each state interviewing a wide range of state officials responsible for the administration of Title I, including State Title I Directors, their staffs, State Auditors, and legal counsel. These interviews were conducted between December, 1975 and March, 1976.

During the interviews conducted in the ten states we attempted to determine: (a) the accuracy of our preliminary analysis; (b) state interpretations concerning areas which, based on a preliminary reading of the Title I statute, regulations, guidelines, and handbooks might be thought to be ambiguous; (c) perceived problems with the legal framework; and (d) areas which SEAs felt were most important to the effectuation of the purposes of Title I.

During our study, we also visited at least one LEA in each state. These LEAs were selected for their particular characteristics, e.g., rural, urban, or recently desegregated. These LEAs explained the operation of Title I in their districts. No attempt was made to analyze the veracity of their comments. NIE will be addressing questions related to LEA perceptions under a separate contract.

Following our site visits, we prepared notebooks describing the states' policies with respect to each LEA program requirement, including appendices containing copies of written materials developed by the states. For example, regarding the "supplement, not supplant" provision,[18] we determined which of the ten states, if any, allow a child participating in a Title I program to be "pulled-out"[19] of a regular class for the entire day to receive services funded entirely under Title I.

18/ This provision is described infra, at p. 33.

19/ For purposes of this paper a pull-out program is one in which an educationally deprived child receives his/her special assistance under Title I in a location other than the regular classroom.

With respect to targeting of children[20] we determined whether the states allow LEAs to select children achieving below their potential, even if their achievement level is at or above their appropriate grade in school.

The sections of this report describing the state legal framework are based on our analysis of written state policies and oral interpretations made by those we interviewed.

It should be noted that this paper does not identify any of the states included in our survey by name nor does it attribute information to specific individuals. The Legal Standards Project and NIE agreed that because of the nature of our inquiry it would be advisable to enter into confidentiality agreements with the states. We believe that such an arrangement does not detract from the utility of the paper since we are analyzing the efficacy of the federal legal framework not those of the states.

IV. Organization of this Paper

This paper is divided into two parts. Part I is the general introduction. Part II includes the Project's findings, conclusions, and recommendations concerning the basis for and clarity, and restrictiveness of the program requirements applicable to local school districts applying for grants under Title I. The focus of Part II is on the efficacy of the

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20 / The targeting of children requirement is described *infra* at p. 29.

existing federal legal framework in general. Part II does not consider the basis for and clarity and restrictiveness of any particular requirement. Such an analysis of major LEA program requirements can be found in Part III of the paper entitled, "An Analysis of the Basis for and Clarity and Restrictiveness of the Program Requirements Applicable to Local School Districts Applying for Grants Under Title I of the Elementary and Secondary Education Act of 1965."

V. Definitions of Major Terms

A. Introduction

Throughout the paper, reference is made to certain terms describing the federal and state documents pertaining to the basic LEA program requirements. These terms are defined below. This section also describes in general the basic LEA program requirements analyzed in this paper.

B. The "Federal" or "Title I Legal Framework"

For purposes of this paper the federal or Title I legal framework includes all documents constituting the "formal" and "informal" legal framework. These terms are defined immediately below.

C. The "Federal Formal Legal Framework"

Whenever Congress enacts new legislation distributing federal funds, a formal legal framework must be developed to specify the requirements and conditions governing the receipt of benefits under the legislation. For purposes of this paper, the Title I "formal legal framework" includes the requirements appearing in the Title I legislation (Title I) and the General Education Provisions Act (GEPA), as well as the regulations officially promulgated by OE which were originally published in the Federal Register (FR) and subsequently codified in the Code of Federal Regulations (CFR). A regulation is a general rule issued by a government agency pursuant to an Act of Congress delegating such "rulemaking" authority to the agency. These regulations are considered to have the "full force of law."[21] This means that a requirement issued as a regulation is as legally binding as a federal statute -- so long as it is within the scope of the agency's delegated power.

In the paper there are references both to "regulations" and to "proposed regulations." The distinction can be explained by describing the process by which a regulation is promulgated. Under the General Education Provisions Act (GEPA), all Title I regulations must first be published in the Federal Register as proposed regulations. During the thirty-day period following this publication, the United States Commissioner of Education (Commissioner) must offer interested persons an opportunity to comment upon the proposed regulations. Following the thirty-day comment period, the Commissioner may (a) decide not to adopt the proposal as a final regulation; (b) adopt the proposed regulation in a modified form; or (c) finally adopt the regulation as originally proposed, without modification.

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[21] See Standard Oil Co. v. Johnson, 316 U.S. 481, 484 (1942). Regulations having the "full force and effect of law" are commonly referred to as "legislative rules". See Davis, Administrative Law Text (West 1972) at p. 126.

If the agency decides to adopt a regulation[22] as final, either as originally proposed or as modified, it must republish the regulation in the Federal Register. Once each year, the regulations which have finally been adopted by OE are republished in Title 45 of the Code of Federal Regulations (cited as 45 C.F.R.).

In sum, the Federal Register is generally used by federal agencies to publish both proposed regulations and finally adopted regulations. The Code of Federal Regulations contains only the finally adopted regulations.

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[22] Section 431 of GEPA (20 U.S.C. 1232). The term "regulation" in accordance with the Education Amendments of 1976, is defined in Section 431 of GEPA to include "any rules, regulations, guidelines, interpretations, orders or requirements of general applicability prescribed by the Commissioner." This section of GEPA also provides that the Commissioner, concurrent with the publication in the Federal Register of a regulation, must transmit to Congress a copy of the regulation which will generally become effective 45 days after transmission unless Congress finds the regulation to be inconsistent with the Act.

In addition to the statute and regulations, the formal legal framework in effect during our interviews included "criteria" developed by OE which appeared in program guides issued by OE (renamed "Program Instructions", these guides were part of OE's Program Directive System). Although these guidelines were widely disseminated, they were never published in the *Federal Register*.[23]

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[23] It should be noted that the legal status of these guidelines in effect during our interviews is uncertain in light of Section 503 of P.L. 92-318 and Section 431 of GEPA. Section 503 provides, among other things, that OE conduct a "study" of all published policy pronouncements, including OE "criteria" or guidelines, and then publish the results of this study in the *Federal Register*. This study was to be completed in 1973. As explained *supra*, Section 431 of GEPA (20 U.S.C. 1232) generally provides that (1) all "regulations" must be published in the *Federal Register*; (2) the public must be provided with a 30-day comment period; (3) these regulations must be republished in the *Federal Register*; and (4) Congress must be given a 45-day period to review them before they go into effect.

Faced with questions concerning the legality of unpublished agency circulars and pronouncements containing mandatory language, the courts have generally concluded that the requirements are binding on state and local agencies with actual notice of them, in keeping with §552(a) of the Administrative Procedure Act (5 U.S.C. §501 *et. seq.*). See, e.g., *Rodriguez v. Swank*, 318 F. Supp. 289, 295 (N.D. Ill. 1970), *aff'd* 403 U.S. 901 (1970); *Hike v. Carter*, 448 F. 2d 798, 803 (8th Cir. 1971); *Kessler v. F.C.C.*, 326 F. 2d 673, 689-90 (D.C. Cir. 1963); Section 552 provides, in relevant part, "except to the extent that a person has *actual* and timely *notice* of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter to be published in the *Federal Register* and not so published."

[Footnote continues]

(footnote continued from previous page)

In two Supreme Court cases involving DHEW, *Wheeler v. Barrera*, 417 U.S. 402 (1974) and *King v. Smith*, 392 U.S. 309 (1968), the court has relied heavily on "requirements" contained in DHEW handbooks. In *Wheeler*, for example, the court authoritatively cited the handbook entitled *Title I ESEA: Participation of Private School Children* (DHEW Publication No. (OE) 72-62, which quotes or paraphrases Program Guide No. 24 (cancelled in 1972) in a determination concerning "comparable services" to educationally deprived children in private schools.

Moreover, Courts unwilling to accord guidelines unpublished in the Federal Register an equal status with officially promulgated regulations, nonetheless might find them to be binding on SEAs and LEAs through the practice and policy of judicial deference to agency administrative interpretations. Agency interpretations and guidelines are of "controlling weight" so long as they are consistent with the language of both statute and regulations. See e.g., *Thorpe v. Housing Authority of Durham*, 393 U.S. 268 (1969); *Bowles v. Seminole Rock Co.*, 325 U.S. 410 (1945).

With respect to those guidelines containing directory language, the suggestions are considered acceptable courses of conduct which will satisfy a legal requirement and presumably have the legal effect of protecting a recipient against audit exceptions if the recommended course of conduct is followed. This latter proposition assumes that the statements contained in the guidelines are not inconsistent with the statute or regulations. Courts have explained that agency interpretations may be disregarded, particularly where they are at variance with its own regulations' clear language or the clear language of the statute. See e.g., *Frances v. Davidson*, 340 F. Supp. 351, 365-66 (D.C., Md.), *aff'd.*, 409 U.S. 904 (1972); *Stork v. U.S.*, 278 F. Supp. 869, 871 (D.C. Cal. 1967), *aff'd.* 430 F.2d 1104 (1967).

These program criteria were based on the law, and served to clarify and further explain the regulations. The program guides also provided basic information about Title I, including technical information about fiscal administration and evaluation, and suggestions for meeting the legal requirements regarding program development.

According to the Preamble to the September 28, 1976 revised regulations, the "criteria" set forth in the guidelines were superseded on October 28, 1976, the date the revised regulations became effective.[24]

In sum, the Title I statute contains the basic requirements governing the operation of Title I programs and projects. The regulations incorporate and explain in greater detail the essential elements of the law. The OE "criteria" in effect during our interviews were based on the law and clarified and further explained the regulations.[25]

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[24] The Preamble states, in relevant part, that "All preceding rules, regulations, guidelines and other published interpretations and orders issued in connection with or affecting Part 116 will be superseded when this regulation becomes effective" (41 FR 42894).

[25] Of course, a regulation and OE-developed criterion which is inconsistent with the legislative requirements would not be valid.

The first set of regulations implementing Title I (P.L. 89-10, the Elementary and Secondary Education Act of 1965), were published on September 15, 1965. Since then they have been amended on March 11, 1966, February 9, 1967, November 28, 1968, October 14, 1971, and June 28, 1973, to incorporate the provisions of P.L. 89-313, 89-750, 90-247 and 91-230. Proposed regulations implementing P.L. 93-380 appeared in the Federal Register on March 11, 1975 (40 FR 11472). Final regulations were issued on September 28, 1976 (41 FR 42894).

The first set of criteria, dated April 14, 1967, was issued as Program Guide No. 36. It was revised and reissued within a one-year period on March 18, 1968, as Program Guide No. 44. Today, this program guide is still used by SEAs and LEAs as one of the primary sources of OE policy.

D. The "Federal Informal Legal Framework"

1. Documents Constituting the "Informal Legal Framework"

Since 1965, the year Title I was enacted, an informal legal framework has supplemented the formal legal framework.

For purposes of this paper, the "informal legal framework"[26] in effect during our interviews included statements of policy issued by OE construing the statute and rules which it administers. OE interpretations concerning the informal legal framework are set forth in such documents as:

- OE handbooks,
- OE program support packages,
- OE guidelines and regulations which have been cancelled or superseded,
- OE program "Notices" and "Instructions" contained in the Program Directive System,
- internal OE memoranda, and correspondence between OE and particular states, construing the statute, regulations, and guidelines.

The informal legal framework also included oral statements made by OE officials at area workshops or in phone conversations (as described to the Project staff during interviews with SEA and LEA Title I personnel).

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[26] The term "informal legal framework" is synonymous with the legal term "interpretative rules". See Davis, Administrative Law Text (West 1972) at p. 126. In addition to performing the rulemaking function (an analysis of which is the focus of this paper), OE is required to monitor and enforce compliance with the rules (adjudicatory function). Periodically, OE sends review teams to each state to assess their competencies with respect to performance of specified administrative functions (for example application approval, monitoring and financial management). In addition, the HEW Audit Agency periodically audits the fiscal integrity of the grant transactions and compliance with the rules. The Title I adjudicative function generally includes (a) the refusal to approve annual plans submitted by states (these plans generally assure that they will faithfully administer Title I); (b) withholding of funds, and (c) recoupment of misspent funds alleged in the audits. Policy is communicated to interested parties in various ways, including for example, OE Review Team and HEW Audit Agency reports. This paper makes references to adjudicatory documents for the limited purpose of explaining the derivation or motivation behind a particular state policy. An analysis of the policy statements made as part of the adjudicatory function appears in a separate paper prepared by NIE.

2. The Distinctions Between the Formal and Informal Legal Framework

There are three basic differences between the formal and informal legal framework. First, unlike the regulations and guidelines, the policy pronouncements made through the informal legal framework are not always widely disseminated to all SEAs and LEAs. For example, a policy clarification made by OE in a letter to one SEA may be unknown to other SEAs. This is an important difference from the viewpoint of program administration.

OE and HEW generally do not disseminate memoranda. For example, OE Review Team Reports, which monitor the administration of Title I in individual states, are generally not forwarded to other states, although such reports are public information.

A second distinction between the formal and informal frameworks is that documents constituting the informal legal framework, especially the handbooks and program support packages, usually use simpler language than the provisions of the statute and regulations. Simplicity does not always increase clarity, but it often increases the frequency with which a document is used.

Although the statutory requirements and the officially promulgated regulations are legally binding obligations and the mandatory criteria set forth in certain program guides in effect during our interviews were binding on those LEAs having actual notice of them,[27] the legal status of the policy statements made within the informal legal framework in effect during our interviews is less clear. Generally speaking, these documents contained OE and HEWAA interpretations concerning the meaning of the statute, regulations, and guidelines. Unlike regulations published in the Federal Register, they did not have the "full force and effect of law." However, courts will defer to an agency's interpretation if (1) the interpretation is not contrary to the clear language of the statute or regulations;[28] (2) the agency has thoroughly considered the issues; (3) the agency's reasoning is valid; and (4) the interpretation is consistent with earlier and later pronouncements, and with the legislative history.[29]

The current legal status of the informal legal framework is even less certain. This uncertainty stems from two factors. First, as explained supra, the Preamble to the revised regulations states that "all preceding rules, regulations, guidelines, and other published interpretations and orders" affecting Title I were superseded the day the revised regulations became effective. Thus, for example, statements appearing in OE handbooks apparently are no longer in effect.

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[27] As explained supra, questions may be raised concerning the enforcibility of criteria found only in program guides; however, to the extent SEAs and LEAs have actual knowledge of them, we have assumed they are binding as legal requirements or contract terms.

[28] Shea v. Vialpando, 416 U.S. 251, 94 S.Ct. 1746, 1754n.11(1974).

[29] Skidmore v. Swift Co., 323 U.S. 134 (1944).

Second, under the Education Amendments of 1976 (P.L. 94-482) Section 431 of GEPA now requires, among other things, that all rules, regulations, guidelines, interpretations, orders, and requirements of general applicability issued by OE be published in the Federal Register as "proposed rules to take effect not less than thirty days after the date of publication." OE must then solicit comments to their proposals, republish the proposals in final form and then submit them to Congress. To date, none of the OE documents constituting the informal legal framework have been issued pursuant to these procedures mandated by the 1976 Amendments.

3. The Importance of Studying the Informal Legal Framework In Effect During Our Interviews

There are three basic reasons for considering the informal legal framework as part of our analysis of the administration of Title I. First, since those documents which were widely disseminated, e.g., handbooks and program support packages are phrased in non-legal, simplified language, they were and still are used and relied on extensively by SEA and LEA personnel as interpretations of legal requirements. For this reason it is important to analyze whether their statements are inconsistent with the statute and regulations. This analysis appears infra, at p. 58.

Second, it is important to analyze those documents which are not widely disseminated to determine whether the federal government's interpretations were consistent, well-reasoned and added clarity to the formal legal framework and, if published in the Federal Register, would substantially increase the understanding of the legal requirements. This analysis appears infra, at p. 64.

Third, certain documents which have been presented to individual states, e.g., OE Review Team Reports, HEWAA Reports, and OE correspondence, have often significantly influenced the policies, procedures and practices of certain SEAs. This discussion appears infra, at p. 86.

E. The "State Legal Framework"

1. Introduction

Under the existing federal legal framework, SEAs are responsible for overseeing the operation of Title I in school districts and private schools. The SEAs' responsibilities include, among other things, approving LEA applications and monitoring LEA Title I programs both to ensure that they meet legal requirements and to determine program quality. These responsibilities demand a keen understanding of the Title I requirements and an ability to apply these standards in assessing LEA practices. More than conceptual understanding of the requirements is required; SEAs must be able to advise an LEA whether a particular plan or practice is legal.

Unlike the federal government, many of the State Departments of Education included in the ten-state survey have no formal rulemaking mechanism, and therefore distinctions between formal and informal state legal frameworks are harder to draw and not particularly useful. Thus, for purposes of this paper, the "state legal framework" includes state policies set forth in officially promulgated regulations, guidelines, instructions for completing application forms, and SEA correspondence with the LEAs.

2. The Importance of Studying State Legal Frameworks

As explained supra, the state rather than the federal government is responsible for the day-to-day oversight of LEA Title I programs. It is the SEA which often interprets and applies federal policies. Thus, it is important to consider whether SEAs have developed policies which are consistent with federal policy and, to the extent practicable, discover the reasons for any inconsistencies. Important questions concerning SEA policies include the following: does the SEA offer examples of illegal practices and models of legal alternatives; does it restrict program design options by prohibiting practices which historically have been the subject of abuses; does the state create additional requirements, and do any additional requirements add flexibility or restrict program design options?

F. Overview of The Basic LEA Program Requirements Analyzed in This Paper

1. Introduction

In the following pages we provide a brief overview of the LEA program requirements. Following this narrative, we describe the basic LEA program requirements analyzed in this paper. These general descriptions of program requirements are listed alphabetically and are not intended to be precise or comprehensive definitions.[30]

2. Overview of the LEA Program Requirements

Title I of the Elementary and Secondary Education Act (Title I) provides financial assistance to local educational

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30 / For a complete analysis of the meaning and scope of these requirements, see "An Analysis of the Basis for and Clarity and Restrictiveness of the Program Requirements Applicable to Local School Districts Applying for Grants Under Title I of the Elementary and Secondary Education Act of 1965".

agencies[31] (LEAs) to meet the special educational needs of educationally deprived children residing in areas having high concentrations of children from low-income families.

In enacting Title I, Congress made the following declaration of policy:

> In recognition of the special educational needs of children of low-income families and the impact that concentrations of low-income families have on the ability of local educational agencies to support adequate educational programs, the Congress hereby declares it to be the policy of the United States *to provide financial assistance to local educational agencies serving areas with concentrations of children from low-income families* to *expand* and *improve* their educational programs by various means which contribute particularly to meeting the special educational needs *of educationally deprived children*. [Emphasis added.][32]

Under the Title I legislation, the United States Commissioner of Education (Commissioner) makes payments to State educational agencies[33] (SEAs) "on the basis of entitlements created under this title."[34]

To determine the amount of a state's entitlement the National Center for Education Statistics computes basic grants based on the number of children from low-income families residing in each county in the state.[35]

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[31] See *supra*, note 3 for the definition of the term "local educational agency".

[32] Section 101 of Title I (20 U.S.C. 241a).

[33] See *supra*, note 10 for the definition of the term "State educational agency".

[34] Section 102 of Title I (20 U.S.C. 241b).

Once an SEA is notified of its total allocation for each county, it distributes the funds to those school districts submitting applications approved by the SEA.

Each application submitted by an LEA to an SEA for approval must contain specific assurances or demonstrate that the LEA will comply with particular Title I requirements.

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[35] All states are entitled to receive funds, and state entitlements are based on the number of children from low-income families residing in the state according to the most recent census and A.F.D.C. statistics as determined by the Commissioner. The original Title I formula was 50% (the "federal percentage") of the average per pupil expenditure in the state multiplied by the number of children (aged 5 to 17) from low-income families. The 1966 Title I amendments increased payments to low expenditure states by allowing the state or national per pupil expenditure to be used, whichever was higher. Low-income families were defined as those families with incomes below the poverty level ($2,000 as of 1966, $3,000 as of 1968, $4,000 as of 1972), plus those families with incomes above the poverty level receiving A.F.D.C. payments. In fact, the $2,000 level was used because Congressional appropriations have never been large enough to fund at a higher level. Congress mandated the use of 1970 census statistics as of July 1, 1972 (P.L. 91-230).

The 1974 Amendments (P.L. 93-380) altered the formula significantly: the state's per pupil expenditure is now multiplied by 40% and the per pupil expenditure level for any state is limited to a range of between 80% and 120% of the national average. The low-income factor is determined by the "Orshansky index" which adjusts the poverty level according to family size and farm/non-farm location. Additionall only two-thirds of the children from families receiving A.F.D.C. payments are now counted. The effect of these changes is to provide more aid to states with a high proportion of families below the "Orshansky index" of poverty and to decrease payments to urban areas where A.F.D.C. payments often put families above the "Orshansky index."

In the words of the Title I statute, funds provided under Title I must be used to "expand and improve" the educational programs for educationally deprived children[36] and for "programs ... designed to meet the special educational needs of educationally deprived children in school attendance areas having high concentrations of children from low-income families."[37]

Each of the above words and phrases from the statute has a special significance which forms the basis for a requirement or series of requirements that LEAs must satisfy to receive grants under Title I.

In order to ensure that Title I programs best meet the needs of the intended beneficiaries, i.e., "educationally deprived children" residing in areas "having high concentrations of children from low-income families", the regulations and guidelines issued by OE contain eligibility and targeting requirements. The eligibility requirements[38] specify the schools within a district eligible to receive funds and the children in those schools eligible to participate in Title I programs. The targeting requirements establish criteria for selecting, from the list of eligible schools and children, those that will actually participate in Title I programs. [39] In most school districts insufficient funds are available to design comprehensive programs for all eligible areas and for all eligible children. Since Congress has never fully funded Title I, funds have generally been insufficient in this regard since the inception of the program. The eligibility and targeting requirements also ensure that LEAs do not discriminate against children qualifying for Title I services, simply because those children attend private schools.

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[36] Section 101 of Title I (20 U.S.C. 241a).

[37] Section 141(a)(1)(A) of Title I (20 U.S.C. 241e(a)(1)(A) (emphasis added).

[38] Id.; 45 C.F.R. §116.17(d)(1975) and 45 C.F.R. §116.17 (a)(1975) now at 45 C.F.R. §116a.20(1976) and 45 C.F.R. §116a.21(c)(1976).

In order to ensure that Title I programs are "designed" [40] to meet the special educational needs of educationally deprived children in low-income areas, the regulations and guidelines require LEAs to demonstrate in their applications for Title I funds that (a) they have undertaken a comprehensive assessment of the special needs of the eligible children (needs assessment);[41] (b) they have described the objectives of the projects in relation to the special needs identified in the needs assessment (program objectives); [42] (c) they have designed their program in accordance with the objectives of the project (program design); [43] (d) they have concentrated funds on a limited number of programs and projects, thereby increasing the likelihood of success in meeting the objectives of the project (concentration); [44] (e) they will evaluate the projects to determine whether the objectives of the project have been met (evaluation); [45] (f) they have coordinated efforts with other agencies concerned with the same target population (coordination); [46] and (g) they have disseminated information concerning effective teaching strategies and techniques to Title I teachers (information dissemination).[47]

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[39] Program Guide No. 44, Section 4.6 and 45 C.F.R. §116.17(f)(1975), now at 45 C.F.R. §116a.20(c)(1976) and 45 C.F.R. §116a.21(e)(1976).

[40] Section 141(a)(1)(A) of Title I (20 U.S.C. 241e(a)(1)(A)).

[41] 45 C.F.R. §116.18(b)(1975), now at 45 C.F.R. §116a.21(1976).

[42] 45 C.F.R. §116.18(b)(1975), now at 45 C.F.R. §116a.22 (a)(1)(1976) and §116a.22(b)(1)(1976).

Other requirements are also intended to ensure that Title I funds are used to "expand and improve" the educational offerings of educationally deprived children and for programs which are designed to meet the "special" educational needs of educationally deprived children, so that Title I funds are not used merely to duplicate or replace services normally provided to children in the school district. To this end, the statute and the regulations contain (a) a provision prohibiting the distribution of state aid in any way which takes an LEA's Title I allocation into consideration and then penalizes the LEA in the distribution of state funds; [48] (b) a requirement that school districts maintain their fiscal effort (maintenance of effort); [49] (c) a provision requiring that Title I funds supplement the level of state and local funding and a restriction against using Title I funds to supplant, i.e., replace, state and local funds that would have been provided to program participants but for the existence of Title I (supplement, not supplant);[50] (d) a provision that Title I funds may not pay for services ordinarily provided in non-Title I areas with state and local funds (ordinarily provided); [51] (e) a requirement that services provided with state and local funds in Title I schools be comparable, that is, approximately equal, to services provided in non-

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[43] 45 C.F.R. §116.18(b)(1975), now at 45 C.F.R. §116a.19(b) and §116a.22(1976).

[44] Section 141(a)(1)(B) of Title I (20 U.S.C. 241e(a)(1)(B)); 45 C.F.R. §116.18(a) and (e)(1975), now at 45 C.F.R. §116a.20(a) and §116a.20(b)(1976). Concentration is closely related to the targeting requirements described above.

[45] Section 141(a)(6) and 141(a)(7) of Title I (20 U.S.C. 241e(a)(6) and (a)(7); 45 C.F.R. §116.22(1975), now at 45 C.F.R. §116.43(1976).

[46] 45 C.F.R. §116.24(1975); now at 45 C.F.R. §116.41(1976).

[47] Section 141(a)(10) of Title I (20 U.S.C. 241e(a)(10); 45 C.F.R. §116.25(a)(1975), now at 45 C.F.R. §116.44(a) (1976).

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[48] Section 143(c)(1) of Title I (20 U.S.C. 241g(c)(1)); 45 C.F.R. §116.44(1975), now at 45 C.F.R. §116.18(1976).

[49] Section 143(c)(2) of Title I (20 U.S.C. 241g(c)(2)); 45 C.F.R. §116.45(1975), now at 45 C.F.R. §116.19(1976).

[50] Section 141(a)(3)(B) of Title I (20 U.S.C. 241e(a)(3)(B)); 45 C.F.R. §116.17(h)(1) and (2)(1975); now at 45 C.F.R. §116.40(1976).

[51] 45 C.F.R. §116.17(h)(3)(1975). Under the revised regulations, the "ordinarily provided" provision has been replaced by the "equitably provided" provision. 45 C.F.R. §116a.22(b)(10)(1976).

Title I schools (comparability);[52] and (f) a requirement that Title I funds be used only for the excess costs of programs and projects (excess costs).[53]

More specifically, the provision which prohibits penalizing reductions in state aid, along with other provisions, ensures that receipt of Title I funds is not used as a basis for discrimination.

The "maintenance of effort" requirement ensures that Title I grantees do not shift to the federal government their ongoing financial responsibilities for their education programs and helps ensure that federal assistance serves a supplemental rather than a basic education function.

The "supplement, not supplant" provisions prohibit LEAs from using the receipt of Title I funds by program participants as a basis for discriminating against children in the provision of state and local funds. In other words, program participants must receive the same level of state and local funds they would have received were Title I not in existence. They cannot be penalized in the provision of state and local funds because they receive assistance under

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[52] Section 141(a)(3)(C) (20 U.S.C. 241e(a)(3)(C)); 45 C.F.R. §116.26(1975), now at 45 C.F.R. §116a.26(1976).

[53] Section 141(a)(1) of Title I (20 U.S.C. 241e(a)(1)); Program Guide No. 44, Section 4.1, now at 45 C.F.R. §116.40(a)(2)(iii)(1976).

Title I. In no case may Title I funds be used to supplant state and local funds.

The "ordinarily provided" provision specified that Title I may not be used to pay for services ordinarily provided in non-Title I areas with state and local funds. As explained supra, this provision has been deleted from the revised regulations. In its place, the revised regulations include the "equitably provided" requirement. "Equitably provided" generally requires that an LEA provide state and local funds for services on an equitable basis without regard to the availability of Title I funds.

The "comparability" requirement, is intended to ensure that services provided with state and local funds to educationally deprived children attending Title I schools are approximately equal to services provided to children attending non-Title I schools, before the addition of Title I funds for Title I schools.

The "excess costs" provision ensures that Title I funds will be used only for the excess costs of programs which exceed the average per pupil expenditures of an LEA for children included in such projects.

In addition, the legislation contains a requirement that programs contribute particularly to meeting the special educational needs of educationally deprived children, and the regulations contain a prohibition against the use of Title I funds to meet the general needs of the schools or the student body at large (general aid prohibition).[54]

Finally, the Title I legislation and the regulations issued by OE contain provisions designed to ensure that the above LEA program requirements are being followed. The most important of these requirements are (a) parent involvement,[55] (b) reporting to the SEA,[56] (c) recordkeeping,[57] and (d) access to information.[58]

3. LEA Program Requirements Analyzed by the Project

a. Access to Information -- Requirements intended to ensure that parents, the general public, the SEA and the Commissioner have access to relevant information concerning, among other things, project design, grant approval, and compliance with Title I.

b. Comparability -- Requirements intended to ensure that before the addition of Title I funds to the target population, the services provided to the target population are approximately equal to the services provided to non-target populations.

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[54] Section 101 of Title I (20 U.S.C. 241a); 45 C.F.R. §116.17 (g)(1975), now at 45 C.F.R. §116a.22(b)(4)(iii), (b)(6), (b)(7) and (b)(8)(1976).

[55] Section 141(a)(14) of Title I (20 U.S.C. 241e(a)(14); 45 C.F.R. §116.17(o)(1975), now at 45 C.F.R. §116a.25(1976).

[56] Section 141(a)(7) of Title I (20 U.S.C. 241e(a)(7)); 45 C.F.R. §116.23(1975), now at 45 C.F.R. §116.46(1976).

[57] Section 141(a)(7) of Title I (20 U.S.C. 241e(a)(7)); 45 C.F.R. §116.23(1975).

[58] Section 141(a)(7) and (a)(8) of Title I (20 U.S.C. 241e(a)(7) and (a)(8); 45 C.F.R. §116.17(n)(1975), now at 45 C.F.R. §116.45(1976).

c. Concentration -- Requirements intended to ensure that Title I funds are provided to the target population in amounts needed to deliver services of sufficient size, scope and quality to give reasonable promise of success.

d. Coordination -- Requirements intended to prevent Title I from duplicating benefits provided to the target population by various federal and state agencies and programs.

e. Eligibility -- Requirements defining which school districts, schools and students are eligible to receive funds or participate in Title I programs. Eligibility criteria are of three types: those defining which school districts may receive assistance under Title I, (those which have maintained their fiscal effort) those defining the general characteristics of funded schools (those areas having high concentrations of children from low-income families) and those clarifying the class of potential recipients (children who are educationally deprived). Eligibility criteria are distinct from targeting standards since the latter determine which subset of eligible areas and recipients will in fact be served.

f. General Aid Prohibitions -- Requirements intended to ensure that Title I funds are used as categorical aid to meet the needs of educationally deprived children, and not used for the general needs of the schools or the student body at large.

g. Information Dissemination -- Requirements intended to ensure that results of educational research and reports on model programs are disseminated to teachers and administrators working on Title I programs.

h. Needs Assessment -- Requirements for empirical inquiry into educational deprivation and the incidence, severity, contributing factors, and relative priority of educationally deprived children's special educational needs.

i. Ordinarily Provided[59] -- Requirements intended to ensure that Title I funds will not be used to provide services in Title I project areas which are ordinarily provided with state and local funds to children in non-project area schools. (now replaced by the "equitably provided" requirement.)

j. Parental Involvement -- Requirements which prescribe the nature and extent of parental involvement in the development and operation of Title I programs.

k. Program Design -- Requirements for establishing the objectives and subobjectives of the Title I program and determining the activities and services which are necessary, sufficient, and best able to accomplish those ends.

l. Program Evaluation -- Requirements which provide that the effectiveness of the Title I program be assessed and analyzed and the results be used by the LEA in the design of future Title I programs.

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[59] The equitably provided requirement is intented to ensure that services paid for with state and local funds are equitably provided without regard to the existence of Title I funds.

m. Recordkeeping and Reporting -- Requirements pertaining to the maintenance of adequate records and the documentation and timely submission of documents on Title I programs including Title I applications and fiscal, evaluation, and comparability reports.

n. Supplanting -- Requirements intended to ensure that (a) school attendance areas and children participating in Title I programs are not penalized in the provision of state and local funds because they are receiving special assistance under Title I; (b) Title I funds are used only to pay for the excess costs of programs; and (c) Title I funds are not used to replace state and local funds that would be provided but for the existence of Title I.

o. Targeting -- Requirements which set forth criteria for selecting, from the list of eligible schools and children, those areas and children that will actually receive benefits under Title I.

PART II

GENERAL FINDINGS, CONCLUSIONS AND RECOMMENDATIONS CONCERNING THE BASIS FOR AND CLARITY AND RESTRICTIVENESS OF THE LEA PROGRAM REQUIREMENTS

PART II
GENERAL FINDINGS, CONCLUSIONS AND RECOMMENDATIONS CONCERNING THE BASIS FOR AND CLARITY AND RESTRICTIVENESS OF LEA PROGRAM REQUIREMENTS

I. Introduction

Part II of this paper offers the Project's general findings, conclusions, and recommendations concerning the basis for and clarity and restrictiveness of the program requirements applicable to local educational agencies (LEAs) applying for grants under Title I.

This paper does not analyze in detail any particular requirement. Such an analysis appears in a separate Project report entitled "An Analysis of the Basis for and Clarity and Restrictiveness of the Program Requirements Applicable to Local School Districts Applying for Grants Under Title I of the Elementary and Secondary Education Act of 1965."

II. General Findings and Conclusions Concerning the Federal Legal Framework

A. Introduction

This section of the paper analyzes, first, the basis for the LEA program requirements set forth in the formal legal framework and, second, the clarity with which these requirements are stated in the formal and informal legal frameworks. Third, this section analyzes the degree of restrictiveness of the existing LEA program requirements.

B. The Basis for the LEA Program Requirements Set Forth in the Federal Formal Legal Framework

1. Introduction and Overview of Conclusions

As explained in Part I, *supra*, Title I is a categorical aid program providing financial assistance to local school districts for the purpose of expanding and improving the educational programs of educationally deprived children residing in school attendance areas having high concentrations of children from low-income families. Programs must be designed to meet the special educational needs of these children.

Each word or phrase has been given a special meaning by Congress and OE. Together, these words and phrases constitute the basic LEA program requirements of the Title I legal frameowrk. This section of the paper analyzes the significance of each requirement and the possible effects of deleting any one of them from the present Title I legal framework.

In general, we have concluded that the basic LEA program requirements (1) specify the class of intended beneficiaries --

educationally deprived children residing in low-income areas; (2) specify the nature of Title I programs -- they must be designed to meet the special educational needs of such children; and (3) attempt to maximize the likelihood that Title I funds will be used effectively to meet the needs of such children, by requiring that programs be properly planned and designed (program planning provisions) and that funds be allocated only for programs intended to provide additional services (funds allocation provisions).

We have also concluded, as is discussed below, that deletion of basic LEA program requirements could substantially change the focus and nature of the existing Title I legal framework and diminish the likelihood [60] that programs will accomplish the purposes of Title I.

These conclusions do not mean that the particular criteria chosen or phraseology used by Congress and OE are themselves necessary; however, the concepts imbedded in certain basic LEA program requirements are necessary to maximize the likelihood that Title I funds will accomplish the legislative purposes described above.

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[60] For purposes of this paper, it is presumed that a program that is well-planned is more likely to accomplish its stated goals than one that is not, and that a program simply cannot provide truly supplementary services unless the funds expended for that program are extra funds provided in addition to the full proper share of regular funds.

2. Program Focus

The child and school attendance area eligibility and targeting provisions of the present Title I legal framework expressly define the class of intended beneficiaries as educationally deprived children residing in low-income areas who are most in need of special assistance. If these provisions were deleted, the present mandatory focus on such children would be eliminated. However, the question remains whether the children Title I is intended to benefit would receive the same or comparable assistance if the level of funding continued, but the class were left undefined.

Based on interviews conducted in ten states and on a review of papers prepared by other researchers,[61] it is our conclusion that LEAs would, in all probability, decrease present funding levels for educationally deprived children residing in low-income areas if the mandatory focus on those children were eliminated. The reasons identified by those interviewed include local pressures to provide special programs and assistance in more affluent areas, local pressures to use federal funds to meet priorities other than compensatory education, the present fiscal crisis facing many jurisdictions, and the concomitant resistance of citizens to tax increases. As one SEA Title I Director explained,

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[61] See, for example, a working note prepared by Stephen M. Barro for the Rand Corporation entitled "Federal Education Goals and Policy Instruments: An Assessment of the 'Strings' Attached to Categorical Grants In Education" (February, 1977) and papers cited therein.

> Historically, the educationally deprived in poor areas do not have the political clout to require the provision of equal resources, and certainly not extra services. Title I ensures that these children will not be ignored. Most LEAs in my State, if left to their own devices would not use federal funds for compensatory education in poor areas; they would be used to counter the current fiscal crisis, whatever that crisis might be.

3. Nature of Program

The Title I legal framework presently requires that funds be used to meet the special educational needs of educationally deprived children residing in low-income areas. The present structure ensures that the focus of programs be educational although the legal framework clearly permits the use of Title I funds to pay for "auxiliary services," e.g., "health" or "welfare" services, to the extent such services are unavailable under other programs and support an educational objective. However, present requirements prevent Title I from being recast as a health or welfare program.

4. Program Planning Process and Parent Involvement

The Title I legal framework specifies the process LEAs must follow in planning a program: needs assessment, establishing program objectives, selecting proper strategies to accomplish objectives, concentration and coordination of resources, and providing for evaluation. These requirements attempt to maximize the likelihood[62] that programs will accomplish their stated objectives. Each requirement responds to a separate concern. Similarly, the parent involvement provisions are included to maximize the likelihood that the program will be successful.

a. Needs Assessment -- Deletion of the needs assessment requirement could have a number of detrimental effects on the program planning process. First, absent a comprehensive assessment of children's needs, certain children residing in low-income areas who are in need of special assistance might be missed; whereas, parents of other children having less need for special assistance might successfully lobby for inclusion of their children in the Title I program. The needs assessment requirement enables LEAs to resist such pressures. Second, if it were not required to conduct a needs assessment, an LEA could use Title I funds to meet low-priority needs rather than the most pressing needs. Third, a needs assessment increases the likelihood that the educational strategies chosen will be effective. Knowledge of the specific needs of the children to be served is essential to the development of effective educational strategies addressing those needs. An extreme example of the consequences of failure to assess the needs of participating children was related by a Title I Director:

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[62] / Section 141(a)(1)(B) of Title I (20 U.S.C. 241e(a)(1)(B) generally provides that Title I programs and projects must be of sufficient size, scope, and quality to give reasonable promise of substantial promise toward meeting the special educational needs of educationally deprived children in low-income areas.

> An LEA decided to design a Title I reading program for grades K-3. It purchased books and hired a teacher without assessing the special needs of the program participants. It did not take long to see that the present design would not succeed because all of the children with reading problems were Mexican-Americans, who did not speak English, and the books were inappropriate for such children, and the teacher did not speak Spanish.

In sum, the needs assessment is used to identify program participants, areas of instruction and the nature of the educational problems that should be addressed. By way of contrast, other program development requirements -- identifying objectives, designing strategies to meet them, concentration of resources, and evaluation -- are intended to maximize the likelihood (1) that the problems that should be addressed are the problems that are in fact addressed, and (2) that they will be addressed successfully.

(b) Identification of Program Objectives -- Specific identification of program objectives establishes a clear direction for program activities. Thus, the formulation of objectives directly responsive to the needs identified in the needs assessment increases the likelihood that program activities will be relevant to identified needs of children. In addition, without objectives it is difficult, if not impossible, to determine whether a program has been successful since objectives establish the criteria against which success can be measured. It is also elementary that objectives encourage purposeful rather than aimless activity.

Elimination of the requirement of objectives would deprive program activities of clear focus and weaken the link between the needs assessment and program implementation.

c. Design of Strategies to Accomplish Objectives -- Similarly, the requirement that strategies be specifically formulated to accomplish program objectives is an important aspect of maximizing the relevance to pupil needs and the likelihood of success of Title I funded activities. This is nothing more than a requirement that (1) Title I programs be planned rather than determined merely by custom or inertia; and (2) that LEA staff use their best judgment to develop program strategies, e.g., regarding curriculum and resource development, that will accomplish previously identified objectives. Like the identification of objectives, this planning requirement provides a needed link between the needs assessment and the implementation of the program.

Advance planning of activities is designed to ensure balance and coordination among program components and to avoid the confusion and wasted energy that often accompanies inadequately planned activities. Most Title I programs require more than one staff member to implement. Advance planning can provide staff members with a clear picture of their roles in meeting objectives and prevent gaps and overlaps in the services provided.

d. Concentration and Coordination -- The concentration requirement which is intended to increase program quality, is based on a simple premise: if funds are spread so thinly that children receive few extra services or only brief exposure to the services provided, little or no progress will be made. Decisions to limit the number of participants to ensure program effectiveness -- so that the services provided are likely to substantially increase the educational attainment of the children served -- are difficult and sometimes painful to make. The concentration requirement serves this important purpose. If the requirement were eliminated, LEA officials might succumb to the pressures to "serve everyone" and implement numerous "pet projects." The coordination requirement is included in the Title I legal framework to avoid a duplication of benefits and to ensure the most effective and efficient use of Title I funds toward meeting the special educational needs of program participants.

e. Program Evaluation -- The evaluation requirement also plays an important role in maximizing program quality. Evaluations determine whether Title I projects are succeeding but, more importantly, they provide valuable insights about how programs might be improved. If the evaluation requirement were eliminated, mistakes could simply be repeated again and again, because no information justifying change would be available. Without an evaluation requirement the other provisions discussed above, intended to insure well planned, purposeful Title I programs, would be hollow indeed -- no check on the effectiveness of their implementation would be available. Thus, the evaluation requirement makes an important contribution to maximizing the likelihood that Title I programs will be successful.

f. Parent Involvement -- The parent involvement requirement is based on several premises. First, when parents are involved in the planning, implementation, and evaluation of a program for their children, there is a greater interest on the part of both parents and children in working toward the success of the program.[63] Second, there is a greater likelihood that Title I funds will be used for well-planned programs for the intended beneficiaries where the parents of the intended beneficiaries are authorized to perform oversight responsibilities with respect to the proper implementation of the program.[64]

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[63] This legislative premise described in the text is expressly set forth in the legislative history--House Report No. 93-805, 3 U.S. Code Cong. and Adm. News 4109 (1974).

5. Funds Allocation Provisions

As explained supra, to ensure that Title I funds are used to expand and improve the educational programs of educationally deprived children and to meet the "special," as opposed to regular or ordinary needs of educationally deprived children residing in areas having high concentrations of low-income families, the legal framework prohibits discrimination (a) by the state in the level of state aid provided to school districts receiving relatively larger sums of Title I funds; (b) by the school district in the maintenance of its fiscal effort (maintenance of effort provision); (c) by the school district in the level of state and local resources provided to Title I designated project areas (supplement not supplant, ordinarily provided--equitably provided, comparability, and excess costs provisions); and (d) by the Title I school in providing state and local funds to children participating in the Title I programs (intra-school supplanting provision).

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[64] A recent report prepared by the Office of the Assistant Secretary for Education/Policy Development, DHEW, entitled, "The DHEW Sanction Study-Enforcement Policy in Title I, ESEA: Analysis and Recommendations" explains that there is a third basis for the parent involvement provisions. "Finally, parent involvement is seen, based on democratic principles, as a good in itself. If institutions develop in such a way that some groups are cut out of the system, or lack political skills to participate, the argument is made that means should be found for bringing them in."

Each provision is included to guard against a distinct type of discrimination in the provision of state and local funds. The deletion of any provision would allow an LEA to pursue a form of discrimination which would result in Title I funds being used for non-"special" purposes and contravene the basic legislative intent.[65] The following examples illustrate the function which each requirement performs.

Assume that in State A the state school aid formula reduces an LEA's state education aid by the amount of Title I funds received, i.e., a school district receiving twenty million dollars in Title I funds will receive twenty million dollars less state aid than it would otherwise have received. In this situation the school district is penalized by receiving less state aid than it would have received but for the existence of Title I. Title I funds, in this example, simply replace state funds resulting in no net increase in funds available to meet the special educational needs of educationally deprived children. The Title I legal framework includes a provision designed to prohibit this type of penalization.[66]

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[65] As explained supra, this conclusion should in no way be construed as saying that the particular criteria chosen or phraseology used by Congress and OE are necessary; rather we are stating that the concepts imbedded in the requirements are necessary to ensure that Title I funds are only used to meet the special educational needs of educationally deprived children.

[66] See supra, note 48.

Assume now that School District 1 reduces its local tax revenues by the amount of its Title I allocation, i.e., the LEA uses Title I funds to replace its local fiscal effort. The net effect is the same as in the example above, with Title I funds simply replacing local funds in Title I schools. The Title I *maintenance of effort* requirement is designed to ensure that federal assistance serves a supplemental rather than a basic education function, and that Title I grantees not shift to the federal government ongoing financial responsibility for basic education programs. [67]

Assume that School District 1, in response to pressure from parents residing in more affluent areas in the district (or because the district does not have an objective system for distributing state and local funds to schools within the district), provides a lower pupil to instructional staff ratio and greater expenditures per pupil for instructional salaries in schools not receiving assistance under Title I than in Title I schools. Assume, further, that the schools in the non-Title I areas provide kindergarten to the children of appropriate age paid for with state and local funds; whereas, the kindergarten age children in Title I areas receive the same instruction paid for with Title I funds.

The Title I *comparability provisions* are designed to ensure that Title I funds provide services in Title I areas that are over and above the level provided from local and

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[67] See *supra*, note 49.

and state funds in non-Title I areas. As Congressman Quie explained on the House floor (Volume 116, Part 8, 91st Congress, 2nd Session at P. 10013):

> ...the whole purpose of Title I is to concentrate and increase efforts on behalf of disadvantaged children because these children need more help than their more fortunate peers. Unless comparable services are provided before the application of Title I funds in schools serving concentrations of poor children, this purpose is defeated.

Thus, the first type of discrimination described above is prohibited by the comparability provisions. [68] The LEA must provide in each Title I area services comparable to those in non-Title I areas. Comparability is determined by specific ratios (pupil to instructional staff ratio and expenditures per pupil for instructional salaries).

However, in the example above, the comparability regulations do not prohibit School District 1 from discriminating against Title I schools in the provision of kindergarten; [69]

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[68] See supra, note 52.

[69] Comparability is generally measured in terms of two ratios; (1) pupil to staff and (2) expenditures per pupil for instructional salaries. The existence of a kindergarten program which adds both pupils and teachers will not show up for purposes of computing comparability. For example, if school A has 8 instructional staff members and 200 children, without kindergarten, its pupil to staff ratio is 25 to 1. If 50 full-day kindergarten children and 2 kindergarten teachers are added to the school its pupil to staff ratio is still 25 to 1 (250 children ÷ 10 teachers).

However, this type of penalization was prohibited by the "ordinarily provided" provision and continues to be prohibited by the new "equitably provided" requirement. [70]

If, for example, there are ten (10) Title I schools and ten (10) non-Title I schools in the school district, each school has 50 children of kindergarten age and the LEA only has sufficient state and local funds to support a kindergarten program in ten of the twenty schools, the ordinarily provided provision is designed to ensure that the Title I eligible children will receive their fair share of state and local funds for kindergarten programs. In this district a proportional distribution of state and local funds would require that five (5) Title I schools receive state and local funds for kindergarten and five (5) non-Title I schools receive such support.[71] The LEA's Title I funds may then be used to provide kindergarten in the remaining five Title I schools. In this way Title I children, taken as a whole, receive supplementary kindergarten services.

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[70] See *supra*, note 51. The revised regulations which were published in the *Federal Register* on September 28, 1976 1976, replaced the "ordinarily provided" provision with a requirement for the "equitable provision" of state and locally funded services. (§116a.22(b)(10), 41 FR 42919). Even before the issuance of the revised regulations OE interpreted "ordinarily provided" consistently with the concept of the "equitably provided" requirement.

[71] If the schools had unequal enrollments, the proportional distribution would have to be determined by the number of kindergarten children in areas eligible and ineligible for Title I services.

Now assume that a Title I school decides to use Title I funds to provide children in the Title I program with their regular academic instruction for the entire school day. The Title I program is identical to the regular program. The class size for Title I children is identical to the class size for children not participating in the program. In sum, children in the Title I program receive no assistance from state and local sources for their education, in contrast to children not participating in the Title I program whose instruction is paid for from state and local funds, e.g., $1,000 per child.

The comparability and ordinarily provided requirements do not prohibit the type of penalization described above, i.e., discrimination which is occurring within the project area school; they only compare services in Title I areas with services in non-Title I areas. It is necessary to look to another requirement, that Title I funds supplement and not supplant state and local funds. The supplement, not supplant requirement,[72] which governs this situation, specifies that Title I funds must not replace the level of funds which would have been made available to children in Title I programs but for the existence of Title I, i.e., children in Title I programs must receive the level of state and local funds they would have received if Title I did not exist.

If Title I did not exist, the children in the Title I program would have received the same level of state and local funds as other children in the school. Thus, the use of Title I funds to provide the regular academic program described above is prohibited by the supplement, not supplant, provision.

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[72] See supra, note 50.

The excess costs provision added by Congress in 1974,[73] which provides that Title I funds may only be used to pay for the excess costs of programs, also governs the above situation. If the state and local expenditure in the district is $1,000.00 per pupil for the regular academic program, Title I may only pay for the costs of the program which are in excess of $1,000.00 per pupil.[74]

The supplement, not supplant and excess costs provisions are closely related. Supplement, not supplant prevents LEAs from discriminating against children in Title I programs in the apportionment of state and local funds, because of the existence of Title I. The excess cost provision reinforces the above standard by governing the level of state and local funds an LEA must commit to the education of children in a Title I program before Title I funds can be used to pay for supplementary components.

In sum, the provisions of Title I which (a) prohibit a state from penalizing an LEA because of the receipt of Title I funds;

73/ P.L. 93-380. See supra, note 53.

74/ In other situations excess costs requirement is useful for determining the amounts which Title I can pay for particular services or other program components, i.e., the excess cost of a particular supplemental service.

(b) require LEAs to maintain prior fiscal effort; (c) require comparability among Title I and non-Title I schools; (d) require that an LEA equitably provide state and local services before using Title I to pay for additional amounts of that service; (e) require Title I funds to supplement and not supplant state and local funds; and (f) require Title I funds to pay for only the excess costs of programs and projects address distinct, but interrelated, forms of discrimination in the allocation of state and local funds to children in Title I programs and schools. Each provision is essential to prevent the form of discrimination it addresses, as described in the examples above. Each is designed to ensure that the "special educational needs of educationally deprived children" are served. If any of these provisions were deleted, Title I could be transformed into general school aid or property tax relief.

In addition to the anti-discrimination provisions described above, the Title I legal framework includes the general aid prohibition, a fundamental requirement designed to ensure the categorical nature of the Title I program. To delete the prohibition against using Title I funds for general aid purposes would have the effect of recasting Title I into a general school aid or property tax relief program and would, in all probability, reduce the total number of educationally deprived children receiving benefits under Title I. During our interviews in ten states, it was made clear to the Project by state and local education officials that there is tremendous pressure to use Title I funds for children who are not educationally deprived and to meet the needs of the school district as a whole. It was also explained that, if these pressures were not confined by the general aid prohibition, educationally deprived children could again be relegated to the low-priority status they occupied prior to the implementation of Title I.[75]

6. Accountability Provisions

The final category of requirements, which include the recordkeeping and access to information provisions, are designed to ensure fund and program accountability. These requirements provide a means for verifying compliance with other Title I legal requirements described above, including, for example, (1) the requirement that Title I funds only be used to meet the needs of educationally deprived children residing in low-income areas and not to meet the needs of children residing in eligible areas who are not educationally deprived or children who do not reside in low-income areas; and (2) the requirement that Title I funds be used to supplement, not supplant state and local funds.

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[75] This is not to say that withdrawal of the general aid prohibition would actually legalize the use of Title I funds for non-educationally deprived children; the child eligibility requirement would still prohibit such an abuse.

These accountability provisions enable the LEA, SEA, parents and HEW to determine whether the substantive requirements of Title I have been satisfied. To delete these accountability provisions would (1) foreclose attempts to document compliance or lack thereof, and (2) limit research which seeks to determine the reasons for the success or failure of Title I programs. Researchers would not be able to determine whether a program failed because of poor design or because Title I funds intended for Title I programs were diverted to other purposes or used to replace state and local funds.

C. The Clarity of the Language Set Forth in the Formal Legal Framework, Supplemented by the Informal Legal Framework

1. Introduction

Do those responsible for implementing Title I requirements know what they can and cannot do? We address this question here; to answer it properly we must first describe in greater detail the significance of the informal legal framework. The documents within the informal legal framework are of two types -- those widely disseminated and those not.

2. Widely Disseminated Documents Are Frequently Used, Although Their Value Is Limited 76 /

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76 / It should be noted that the analysis of the widely disseminated documents set forth below is in no way exhaustive. Detailed analyses of specific points are included throughout Part III of the Project's paper referred to *supra* at p. 3 n.

In the past eleven years, OE has published a number of handbooks and program support packages intended to clarify requirements set forth in the statute, regulations, and program guides.[77] The topics of these handbooks include selecting school attendance areas, parent involvement, writing performance objectives, preparing comparability reports, conducting on-site visits, and reviewing project applications. Program support packages have been written explaining virtually every LEA program requirement and SEA administrative function.

We have concluded, based on our interviews in ten states, that these widely disseminated documents: (a) are generally (but not always) consistent with the statute, regulations, and guidelines they were intended to clarify; (b) in several cases include substantive rules or suggestions for appropriate courses of conduct not otherwise appearing in the statute, regulations or guidelines; and (c) were helpful to SEA and LEA personnel and parents who used them primarily because of their general nature and simplicity of language.

We have also concluded that these documents, although widely used, are of limited utility because they: (a) rarely addressed difficult issues needing interpretation; (b) were not always precisely phrased; (c) were not always internally consistent; and (d) were often outdated. The discussion below illustrates these points.

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[77] In addition to dissemination of handbooks explaining various Title I requirements, OE has disseminated "exemplary" Title I program designs. Many of these "exemplary projects" appeared to be inconsistent with the basic Title I requirements. Several SEAs interviewed strongly criticized OE's failure to edit properly these "exemplary projects".

The handbook Title I ESEA: How It Works -- A Guide for Parents and Parent Advisory Councils (OE-73--7104) was generally well received in the states. In fact, one state Title I Director used this handbook as a manual for training his staff and local Title I coordinators, as well as parents. The handbook describes in simple language the basic LEA requirements, the functions which SEAs and OE must perform, as well as the duties and responsibilities of parent councils.

The handbook's intended purpose was to describe the basic Title I legal framework in general terms; it was not intended to be definitive. Consequently its use in lieu of the Title I statute or regulations is inappropriate.

Though for the most part general and descriptive (rather than specific and prescriptive), this handbook occasionally included substantive policies and suggested courses of conduct not expressly mentioned in the statute, regulations, or guidelines. For example, the handbook explained, on page 61, that an LEA using more than one data source to determine the number of children from low-income families in each attendance area must evaluate the importance and reliability of each data source and give it a weighting. Further, the handbook, at page 10, explains that "like any other formerly constituted group, the parent council must have an organizational structure." "Ideally, the council chairman should not be an employee of the LEA."

While these additions were often useful, ambiguities detracted from the handbook's usefulness. For example, in describing the needs assessment requirement, the handbook stated that, "identifying the educationally deprived children," is the first step of the needs assessment process and to perform this step an LEA should select a key indicator and "apply it to children at all ages and grade levels." However, on the next page, the handbook approved a flatly contradictory policy:

> In order to concentrate its Title I money on a limited number of eligible students, a school district must establish priorities for the use of Title I funds. Some states have set priorities for their school districts by limiting the use of Title I funds to elementary schools; this means the needs of students in grades 7 to 12 are not even considered in the needs assessment.

A second handbook, entitled Title I ESEA: Selecting Target Areas (OE-72-138), has not been as well received as How It Works described above. However, selected portions of the manual have been used by the ten SEAs and disseminated to LEAs. The handbook explained in clear and precise language the technical rules of school attendance area eligibility in existence at the time of its issuance. However, subsequent to its publication, several significant changes in the regulations have been made in accordance with the 1974 Education Amendments; these are not reflected in the handbook.

In other respects the targeting handbook was even less satisfactory. The handbook contained inaccurate citations,[73] and occasionally used imprecise terminology to describe and define certain concepts. As a result, knowledgeable SEA Title I directors were forced to pick and choose among its assertions. Other Title I directors made no attempt to reconcile the inconsistencies.

The targeting handbook used the terms "selected attendance areas," "project areas" and "target areas" in a random, confusing fashion. "Target area" was defined as referring "collectively" to eligible attendance areas and project areas. In normal usage today, however, the phrases "target areas" and "project areas" denote areas actually served by Title I programs rather than all areas eligible for Title I.

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[73] The problem of including inaccurate citations is discussed in Part III, Chapter 2 of the Project's paper cited to *supra*, p. 3 n. 11.

In spite of its imprecise use of terms, the targeting handbook clearly spelled out which attendance areas may legally be designated areas in which Title I funds may be spent; the step-by-step process for making this selection of areas was unambiguously delineated.

What conclusions about the administration of Title I should be drawn from the defects of these documents which circulated within the informal legal framework? After making the observations about the problems of the handbooks, one writer concluded that "a state or local program manager seeking to determine the meaning of 'project area' will find himself confronted with imprecise terminology, fuzzy relationships and ambiguous delineations of responsibility within the Title I regulations and guidelines." 79 /

Although finding the same problems of terminology in the handbooks, we found that the state documents reviewed by the Project indicate that the SEAs understand the proper procedure for selecting attendance areas for Title I programs, and have clearly so instructed their LEAs. Some SEAs also use inconsistent language, but no confusion exists about the attendance areas which Title I may serve. SEAs have clearly communicated the attendance area selection process to LEAs.

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79 / Milbrey Wallin McLaughlin, "Implementation of ESEA Title I: A Problem of Compliance" Teachers College Record February, 1976, Volume 77, No. 3, at p. 405.

Moreover, unlike the handbooks, the regulations are not "fuzzy," "imprecise," or "ambiguous" about the meaning of project areas. Our interviews with SEAs show that a complaint about inconsistent references, for example to "project areas," appears to have little or no significance in 1976 or 1977 for the administration of Title I. Still, the sheer irritation of inconsistent usage is sufficient justification for its elimination.

3. The Documents Which Were Not Widely Disseminated Often Provided Clear, Consistent, Reasonable, Non-Restrictive Interpretations of the LEA Program Requirements

On numerous occasions OE has, in correspondence with individual states, dealt with the difficult questions not included in widely disseminated documents. The Project analyzed the correspondence between OE and the states in our survey, as well as much additional OE correspondence. Based on this analysis, we have concluded OE has already interpreted in writing many of the most difficult and controversial issues, and these interpretations are generally clear, consistent, and reasonable when viewed as a whole.

Specific letters, read in isolation, were often difficult to understand. However, in every case, when a letter was read in conjunction with other OE letters on related points, an underlying policy emerged which was clear, consistent, and reasonable. Furthermore, we generally found that the letters gave SEAs and LEAs maximum flexibility within the statutory intent.

In short, we conclude that there exists at this time a body of interpretations which, if assembled, summarized, interrelated and published in the *Federal Register* would resolve most of the recurring questions about Title I raised by SEAs and LEAs.

For example, OE letters concerning supplanting explain the design of pull-out programs of various duration, the design of in-class programs, the issue of giving credit to a student for classes taught by Title I paid teachers, the classes a child can be pulled-out of,[80] the use of Title I funds for sick leave or plant operation and maintenance, and the circumstances under which the LEA may phase-in programs formerly funded under Title I. In addition, the OE letters consider such needs assessment and targeting issues as the use of standardized tests, the meaning of the term "greatest need," and the selection of kindergarten children.

In sum, any contention that OE does not have the capacity to interpret the law in a consistent, clear, and unambiguous manner while at the same time allowing flexible program design is, in our opinion, unfounded.

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[80] The term "pull-out" is defined *supra*, n19

OE can be faulted, however, for not widely disseminating these interpretations and for not publishing them in the Federal Register. Where SEAs have sought clarification of legal requirements and operative definitions found in the regulations or guidelines, OE's responses have tended to be oracular rather than clear and comprehensive. As explained above, OE has consistently, and soundly, we believe, interpreted Title I provisions, but SEAs generally have not been given insight into OE's overall interpretation -- they have received only one slice at a time. Too often OE has kept its thoughtfully formulated answers to difficult issues hidden from view.

It should be noted that we are only commenting on OE's correspondence to agencies containing interpretations of policy. We are not claiming that OE has zealously enforced its interpretations. A conclusion on such a topic would be possible only after empirical inquiry not within the scope of our project.

4. The Language of the Federal Formal Legal Framework, Even When Supplemented by the Informal Legal Framework, Does Not Take Into Consideration the Needs of its Audience

a. Introduction -- We have concluded that the language of the standards and operative definitions for most LEA program requirements, as set forth in the existing formal legal framework, supplemented by the informal legal framework in existence during our interviews, does not take into consideration the needs of its audience. However, we found that the adequacy of the federal legal framework must be viewed from at least three perspectives: the perspective of the knowledgeable, experienced and committed person working in Title I administration; the perspective of persons involved in the administration of Title I who lack the time _or_ inclination to study the law _and_ develop comprehensive policies; and persons not involved in the administration of Title I.

b. _The Knowledgeable, Experienced, Committed Person_--First, the formal legal framework, supplemented by the informal legal framework has been _sufficiently clear and precise_ for a person

- who, if she or he works at the state level, has received a mandate from the chief state school officer to administer the program in accordance with the spirit and letter of the law; or, if she or he works at the local level, is a Title I planner receiving the support of the superintendent, and
- who has been active in the administration of Title I for a number of years
- who is familiar with the informal legal framework, and has requested clarification from OE regarding interpretation of the law
- who has sufficient time to study and interpret the requirements and then develop comprehensive written policies.

We found several SEA Title I directors fitting the above description who had taken the time to develop models explaining difficult concepts. For example, one aspect of the so-called "supplanting" provision generally prohibits LEAs from discriminating against children served by Title I in the provision of state and local funds that would have been provided to them but for the existence of Title I. Several state models explain how to design legal, non-supplantive "in-class" and "pull-out" programs. Their explanations are consistent with OE regulations and guidelines and with OE interpretations contained in written correspondence with other states. For the most part, these state policies permit maximum flexibility of program design.

It is a credit to these SEAs and to the general consistency of the requirements of the formal legal framework that the SEAs were able to resolve successfully certain difficult issues without additional guidance from OE. Yet it is OE's role to resolve major conceptual difficulties. SEAs' primary roles should be ensuring that Title I programs are well-planned, of high quality, and are designed to meet the needs of the intended beneficiaries, i.e., educationally deprived children in low-income areas.

c. Persons Involved in the Administration of Title I Who Lack the Time or Inclination to Study the Law and Develop Comprehensive Policies -- The language of the formal and informal legal framework is likely to be unclear in certain respects to SEA Title I staff who lack the time or inclination to study the law and develop comprehensive policies.

A specific request by an SEA to OE for clarification of a requirement may do little since OE's individual responses have often been cryptic and assumed an understanding of OE's overall framework about which OE, itself, has generally been inscrutable. Consequently, an SEA which has not the time or inclination to develop a comprehensive Title I policy may not be able to comprehend the significance of an OE interpretation concerning a particular requirement.

For example, one Title I Director asked whether a high school student enrolled in a Title I funded remedial class could receive credit toward graduation for the class, since the teacher was paid solely from Title I funds (a supplanting issue).

In response to this question, OE explained:

> Another way of assuring the maintenance of the level of state and local funding for children in the Title I program is for the applicant to provide state and locally funded instructional resources directly to the Title I program on a basis that is commensurate with the number of children participating

> in that program. The latter approach must be followed if the Title I program provides the participating children with all of their instruction in a particular curriculum area whether or not they receive academic credit for such instruction.

Not being familiar with the relationship between excess costs and supplanting provisions, the SEA misinterpreted the letter and concluded that credit could be given when Title I paid for elective but not required courses. If this letter had been sent to one of the knowledgeable, experienced, and committed SEA Title I directors (described above) who had taken the time to develop a comprehensive policy concerning supplanting, the interpretation would have been different. Consistent with the non-supplanting models developed by these knowledgeable Title I directors, which explain the relationship between the non-supplanting and excess costs provisions, the SEA would have informed their LEAs, as one SEA actually did, that

> As presently implemented, the Title I math program is supplanting local and state effort since the eligible Title I children are receiving their math instruction from Mr. James and are receiving credit toward graduation and/or promotion for the Title I work completed.
>
> This is contrary, in our opinion, to the "over and above" philosophy of the Title I legislation, regulations and guidelines. This view is based on the fact that every student earns instructional time and support services from local and state fund sources which may not be omitted because a child qualifies for participation in the Title I project.

The Title I legal framework may also be viewed from the perspective of the SEA which uses the alleged ambiguity of Title I requirements as an excuse for failing to perform Title I administrative responsibilities. Those SEAs which take little initiative with respect to the administration of Title I are unlikely to provide much guidance to LEAs unless OE's requirements are frequently, widely, and clearly stated. Where OE's interpretations are perceived as opaque, the SEA may conclude that it is better to leave LEAs on their own, rather than issue an SEA interpretation and risk conflict with LEAs.

In sum, OE has assumed a level of understanding by SEAs which does not uniformly exist. We have concluded that for Title I to be administered uniformly throughout the states, OE must clarify the requirements of Title I, their interrelationships and applications in a comprehensive and understandable format and these clarifications must be set forth in the Federal Register. In this way, SEAs which have not taken the time to undertake a comprehensive analysis of the federal legal framework will neither feel insecure about issuing an interpretation, nor over-react to a perceived problem by adopting overly restrictive policies. We have concluded that the revised regulations show only limited improvement over the old regulations in this regard.

Certain SEAs contended that some auditors are inconsistent about what Title I requires and force LEAs to pursue restrictive educational policies. We did not study the HEW Audit Agency. However, since the audit agency is not a part of OE and undoubtedly has used inexperienced as well as experienced staff for Title I audits, it is likely that the same uncertainty about Title I requirements that has affected some SEAs has also had an effect on some HEWAA personnel.

d. Persons Not Involved with the Administration of Title I -- We did not study the perceptions of individuals who are outside of the administrative framework of Title I. Yet persons such as teachers, educational researchers, and others have important roles to play in Title I and an equal claim to an understandable and comprehensive written description of its requirements. If OE has left questions about its requirements in the minds of certain Title I administrators, OE has been even less helpful to others with an interest in Title I. As a consequence, some educational researchers have erroneously assumed that Title I prohibits certain activities, e.g., in-class instruction, and mandates a uniform rigid response to the needs of educationally deprived children.

e. Conclusions -- In short, we conclude that many of the perceived problems identified by LEAs, SEAs and educational researchers stemmed from (a) OE's failure to promulgate regulations which take into consideration the needs of the affected audience and (b) OE's failure to widely disseminate a precisely phrased informal legal framework including a body of interpretations which, if assembled, summarized, interrelated and published in the Federal Register would resolve the overwhelming majority of difficult questions raised by LEAs.

Furthermore, those SEAs which understand the various LEA program requirements have had to spend too much of their time decoding the meaning of the standards and operative definitions set forth in the formal legal framework and in explaining these requirements to the LEAs. The primary responsibility for making such interpretations rests by law with OE.[81] SEAs should be able to spend more time providing technical assistance as part of their application approval and monitoring responsibilities.

D. The Degree of Restrictiveness of the Federal Formal Legal Framework, Supplemented by the Informal Legal Framework

We have concluded that the language of the federal legal framework in effect during our interviews was generally not restrictive [82] with respect to the design and effective delivery of educational services to educationally deprived children residing in low-income areas. The requirements, consistent with the Congressional Declaration of policy referred to *supra*, ensure

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[81] See the discussion of the Education Amendments of 1976, supra, at p. 23.

- that the intended beneficiaries actually receive the benefits,
- that the program is well-planned and designed to best meet the needs of the intended beneficiaries, and not the needs of the school system, however pressing such needs may be,
- that the LEA does not discriminate against areas or children receiving benefits under Title I in the provision of state and local funds and services provided in non-project areas

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[82] In the course of our analysis, we did discover OE interpretations which could be construed as being overly restrictive. In several of these situations, we have included recommendations concerning appropriate changes. We also found that certain changes are appropriate with respect to the interrelationship between Title I and state compensatory education programs. Recommendations concerning state compensatory education programs are set forth in a separate paper entitled, *A Description and Analysis of the Relationship Between Title I and Selected State Compensatory Education Programs*.

We have also concluded that OE has, generally, interpreted Title I in a consistent and reasonable manner, allowing the maximum degree of flexibility permissible, without abandoning the principles described above. The Title I requirements are minimum process standards that do not restrict the design and implementation of innovative programs for educationally deprived children residing in low-income areas. [83] The flexibility of Title I can best be illustrated with specific examples of the types of policies and programs which Title I permits. [84]

- An LEA may design a program under Title I which provides special services to educationally deprived children while they are in their regular classroom or the LEA may decide to provide such special instruction in a separate location. This latter option is commonly referred to as a pull-out program. The LEA choosing the latter model may "pull" the child out for one period per day or for the entire day.

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[83] One SEA Title I director explained to us that, "Saying that Title I is restrictive is a code word for saying that Title I should be a general aid program."

[84] The following illustrations are derived from a review of the statute and regulations in effect during our interviews and were generally contained in OE interpretations included in correspondence with SEAs. The revised regulations have not expressly modified any of the interpretations summarized above.

- It can design a program which is coordinated with the regular instruction or totally restructure the child's curriculum with respect to one area of instruction or with respect to the child's entire curriculum.[85]
- An LEA may purchase equipment, materials and supplies and even construct buildings with Title I funds under specified conditions. For example, requests for the purchase of equipment must be fully justified on the basis that the equipment has been selected and designated for specific purposes in connection with Title I project activities. The federal requirements do not, moreover prohibit the incidental -- the insignificant, insubstantial, and non-regular use of equipment purchased with

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[85] Part III, Chapter 9 of the Project's paper referred to *supra*, at p.3 n.11 entitled "The Supplement, Not Supplant Provisions" explains the funding source(s), i.e., state and local versus Title I which must be used depending on the design chosen.

Title I funds for non-Title I related purposes.[86]

- An LEA may use its Title I funds in any grade levels it chooses. Title I is not restricted to the elementary grades.
- An LEA may focus its Title I funds on the children who are furthest behind grade level at each eligible school, (e.g., all children functioning at or below the 25th percentile), or it can serve all educationally deprived children (e.g., all children functioning below the 50th percentile) at the schools having the highest incidences of children from low-income families, or it may implement any consistent policy midway between these two fully permissible extremes.
- An LEA may serve educationally deprived children in all its schools where there is no wide variation in the incidence of poverty among the schools in the school district.
- An LEA may use Title I funds to pay for support services such as psychological counseling or medical assistance, so long as the services address a

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[36] Because of wide-spread abuses in the early days with respect to the expenditure of Title I funds for these items, many states require comprehensive justifications before they will approve such expenditures.

need which is a factor contributing to the presence of educational deprivation or educational need, the needs assessment shows the actual need for the services, other sources of funding for them are not available, the services are not ordinarily provided with state and local funds to children not participating in the Title I program, and only children in the Title I program take advantage of the services on a regular basis.

- An LEA may phase-in a new program such as kindergarten without having to first serve all Title I project areas, so long as the program is equitably distributed throughout the system, in such a way that educationally deprived children in project areas are not penalized or discriminated against.

Furthermore, we have concluded that while OE has generally interpreted Title I in a consistent and reasonable manner, it has not widely disseminated its interpretations or examples of their application to recurring situations by including these interpretations in the Federal Register. Although Title I permits great flexibility in the design of educational programs, OE has not provided SEAs with sufficient guidance about how to design a variety of programs within the Title I legal framework. Some SEAs have responded to this vacuum by developing their own flexible models for Title I programs. Other SEAs, because of their uncertainty or misconceptions about the meaning of certain requirements, have either promulgated overly restrictive policies concerning the kinds of programs Title I may fund or matched OE's lack of guidance with their own silence. This lack of clarity has not encouraged flexibility in program design; rather, it has discouraged the development of innovative programs. We have concluded that if OE had resolved and disseminated answers to persistent SEA questions concerning the legal framework, by including its interpretations in the _Federal Register_, many of the erroneous impressions that Title I requires programmatic rigidity would never have been formed.

In short, we have concluded that _increased clarity_ in the formal legal framework, particularly in OE regulations, _would result in greater LEA freedom to design flexible Title I programs_. [87]

III. General Findings and Conclusions Concerning The State Legal Framework

A. Introduction

In the past, many SEAs did not take seriously their oversight responsibilities under Title I. They were not willing to interfere with LEA practices, LEA applications were given only cursory review, and little, if any, on-site monitoring took place.[88] This attitude was reinforced by SEA perceptions that OE was unwilling to exercise active oversight over them. Although the HEW Audit Agency was reporting widespread mis-expenditures of Title I funds, OE was viewed as being unwilling to act upon the allegations.[89] In this environment, the question of whether the requirements were clear and flexible was not of central importance because of a belief that it did not make any appreciable difference whether the requirements, whatever they were, were followed at all.

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[87] For a discussion of additional reasons why SEAs and LEAs may pursue inflexible policies, see our analysis of state legal frameworks appearing below.

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[88] *See*, e.g., Washington Research Project and NAACP Legal Defense and Educational Fund, *Title I of ESEA: Is It Helping Poor Children?* Washington, D.C.: Washington Research Report of the Southern Center for Studies in Public Policy and the NAACP Legal Defense and Education Fund, 1969 and *An Even Chance: A Report on Federal Funds for Indian Children in Public School Districts*. Washington, D.C.: NAACP Legal Defense and Educational Fund, 1971. *See also*, M. Wargo *et al*, *ESEA Title I: A Reanalysis and Synthesis of Evaluation Data from Fiscal Year 1965 through 1970*, American Institutes for Research in the Behavioral Sciences, (March 1972) at 5: "HEW audits of 40 states conducted between FY 66 and FY 69, for example, indicated that states have failed to adequately review LEA project applications, monitor and audit LEA activities, and insure proper financial control of Title I expenditures. More specifically, state audits of LEAs were of limited scope in 24 states and too infrequent in 11. Nine states failed to require adequate project justification from their LEAs and 32 used, or allowed their LEAs to use, improper accounting procedures and internal fiscal controls. Further, LEAs were permitted to use Title I funds as general school aid in 7 states; to supplant (replace) other federal, state, and local funds in 14 states; and to divert funds for purposes unrelated to Title I in 18 states. Twenty-one states failed to ensure that their LEAs concentrated their resources on the most academically needy children. Poor equipment management was also observed as a failure to obtain community and parent involvement in the planning, implementation and evaluation of projects."

Today, (and this may also be true for the last few years), the attitudes of many of the SEAs included in our survey concerning their responsibilities and their perception of OE's oversight role are different.

The review of the state written materials and the SEA comments made during our interviews indicates that a number of SEAs are today taking seriously their administrative duties under Title I and, consequently, are anxious for OE to clarify the requirements which they must administer.[90] Some of these changes are described below.

First, a willingness of SEAs to regulate LEA Title I practices is evidenced by the comprehensiveness of recently-developed state materials. For example, the legal non-supplantive models developed by several SEAs, discussed supra, were developed during the 1975-1976 school year. A comprehensive manual for parents was developed by one SEA in 1975. Many application forms now require comprehensive narratives describing the Title I programs and projects.

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[89] Id.

[90] Though we are confident of this point, the reader should be reminded that our findings are based primarily on a review of state written materials and on our interviews. We did not analyze whether and how effectively SEAs perform their administrative functions such as application approval, monitoring, fiscal management, technical assistance and enforcement.

Second, SEAs appear to be implementing suggestions of OE Review Teams and HEWAA Reports. In one state, we found a review team report for one year indicating that the state's Title I application did not request sufficient information respecting compliance with the school attendance area eligibility requirements. In the next year's application form, however, changes in response to the OE recommendations were evident. The same state had been told in a recent audit that the "SEA approved project proposals, contrary to established project approval criteria that did not clearly state education objectives or the type and extent of change expected." By the next year, though, this SEA had established procedures to ensure, "that all projects will be stated in performance terms with an appropriate evaluation scheme." In a second state where the 1968-1971 OE Review Team Reports had found a substantial number of problems, the Review Team Report in 1975 was highly complimentary. There is still room for improvement: one state included in our survey is still the subject of highly critical OE reviews.

Third, SEAs are questioning the quality and even the legality of some of the documents disseminated by OE. One SEA Title I Director explained to us that one of his most important administrative tasks is censoring OE disseminated materials prepared before 1972 which describe exemplary programs involving clearly illegal practices under present interpretations. He was concerned that these materials would confuse the LEAs and make his job that much more difficult

Finally, one SEA Title I Director described an incident which occurred at a regional meeting called by OE following the promulgation of proposed regulations in March of 1975. An SEA Title I Director asked the OE respresentative to clarify a particular phrase in the regulations. The OE representative winked and said the standard had intentionally been phrased in vague terms to preserve "maximum flexibility." At that point, almost the entire audience reacted; they wanted to know what was expected of LEAs so that SEAs could ensure that the expectations were realized. SEA representatives demanded clarity, not obfuscation.

Although we did not undertake an exhaustive study of the reasons for this change in attitude, the following are reasons provided to us by some of the Title I Directors we interviewed.

First, many of the SEAs and LEAs interviewed now believe that OE will actually attempt to recover misspent Title I monies. The existence and functioning of the HEW Audit Hearing Board has clearly affected the development of these beliefs.

Second, many SEAs believe that after 11 years of federal categorical aid a shift to federal general aid "with no strings attached" is not in the offing. Consequently, SEAs have a greater interest in influencing policy under the present legal framework.

"Watergate" also appears to have had an effect. One SEA attributed its recent change in policy from a laissez-faire approach to meaningful oversight to heightened awareness in state agencies of their responsibility to act in accordance with the law.

In sum, many SEAs included in our survey (a) appear willing to perform satisfactorily their administrative functions and (b) believe that OE will seek repayment when the HEW Audit Agency finds that Title I funds have been misspent.

In this context, the ability of the SEA to comprehend the meaning of the standards and operative definitions set forth in the formal legal framework, supplemented by the informal legal framework, takes on added significance.

Set forth below are our general conclusions concerning the overall quality and comprehensiveness of the Title I policies developed by the states included in our survey. Also analyzed are the reasons which might motivate a state to develop a comprehensive policy. In this regard, two types of state policies interpreting federal requirements are considered -- state policies which legitimately encourage maximum flexibility and state policies which unnecessarily restrict LEA program design options due either to misinterpretation of the federal legal framework or conscious policy choice.

Finally, we discuss comprehensive state Title I policies interpreting the federal requirements which are the least specific, namely, those governing needs assessment and program design.

B. Comprehensiveness and Quality of State Legal Frameworks

1. There Exists Considerable Variation Between States.

We found significant variation among states with respect to the scope and comprehensiveness of SEA interpretations of Title I.

Many states have developed comprehensive interpretations of one requirement, or an aspect of it, while leaving others unexplained. One state, for example, has developed comprehensive materials explaining the "intra-school supplanting aspect" of the general supplanting provisions and comprehensive policies respecting parent involvement, but none concerning the "ordinarily provided" concept,[91] targeting of children, needs assessment or concentration.

A second state has developed comprehensive materials with respect to targeting children, needs assessment and evaluation, but virtually no materials with respect to the other requirements.

The quality of state interpretations of Title I requirements also varies considerably. Some are sufficiently clear to guide LEAs in determining whether specific practices are legal. Others simply reiterate federal materials. Furthermore, we found a range of SEA approaches concerning the interpretation of particular requirements--from doing nothing, to reprinting or paraphrasing broad federal policies, to the development of state guidelines explaining how the broad policy would apply in certain factual circumstances, to the development of legal models.

In summary, no single conclusion can be stated concerning the comprehensiveness or quality of state Title I policies in general.

2. Possible Explanation Concerning The Development of Comprehensive State Policies

We found three factors motivating states to develop comprehensive interpretations of particular Title I requirements: (1) criticism of former state practices in reports by OE Review Teams or the HEWAA; (2) LEA demands for clarification concerning a specific issue; (3) SEA desire to promote its educational philosophy.

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[91] These provisions are discussed *infra*, in Part III of the Project's paper referred to *supra*, p. 3 n. 11.

We found that the first two reasons were the primary factors motivating the development of policies concerning targeting of children, supplanting, general aid, and comparability. Some states, e.g., those which developed a comprehensive policy concerning the supplement, not supplant provision without much prodding, are exceptions to this pattern. The third rationale generally motivated the development of policies with respect to such requirements as needs assessment, program design, and evaluation.

The reason for this is apparent. SEAs feel more comfortable issuing and then monitoring compliance with requirements which are traditionally thought to be within the realm of educators' expertise. SEAs appear less likely to take the initiative with respect to requirements that protect the categorical nature of Title I programs. As explained supra, however, more SEAs are now willing to exercise leadership with respect to the latter requirements.

so long as they receive sufficient support from OE. It is important that this support, as well as advice, be forthcoming.

We found that the SEAs which have developed comprehensive written policies spent an inordinate amount of time doing so. This is because, in the absence of adequate OE guidance, they had to "discover" the meaning and scope of each standard and operative definition. The time required is a major deterrent to the development of comprehensive policies by other SEAs. Moreover, this time could be better spent providing technical assistance to help LEAs improve the quality of their programs.

In our recommendations concerning specific Title I requirements, we have recommended that SEAs assume specific technical assistance responsibilities. These responsibilities will be difficult for SEAs to perform satisfactorily if they must spend great amounts of time determining how to apply specific legal standards to particular fact situations. The same fact situations arise in LEAs throughout the country. OE must assume the responsibility for clarifying federal requirements and explaining how they apply to the full range of educational programs and services for which LEAs may use Title I funds.

a. Comprehensive State Policies Which Clarify But Do Not Restrict the Design of Programs--Several states have developed comprehensive policies which clarify the range of acceptable LEA policies without pursuing unnecessarily restrictive policies. For example, in one state the Title I application includes several legal, non-supplantive program design models which LEAs may pursue, including in-class and pull-out designs. A second state clearly describes the various options available to LEAs concerning the determination of which school attendance areas are eligible to receive Title I funds.

A third state includes in its policy statements examples of specific practices which are legal and those which are unacceptable.

Probably the two least specific LEA program requirements are the needs assessment and program design requirements. Several SEAs have filled this void with comprehensive policies describing the process and range of acceptable alternatives.

b. State Policies Which Limit Local Options--In addition to nonrestrictive policies, such as those in the above illustrations, we found state policies which limit local discretion. These policies are directed toward either (a) objectively defining federal requirements, (b) guarding against audit exceptions, or (c) promoting the educational philosophy of the SEA.

The first category of state policies concern federal requirements which allow states significant discretionary authority. One example is the concentration requirement which states that programs must be of "sufficient size, scope, and quality" to assure reasonable promise of success. To implement this requirement, one state requires LEAs to spend a minimum of $234 in Title I funds per child served in a Title I program. In a second state the permissible range is $350 to $550.

The second category of state policies, which are intended to guard against possible audit exceptions, are pursued either by choice or because of insufficient understanding of the federal requirements.

For example, one SEA will only approve pull-out programs under Title I. Another state prohibits program design components which, based on past experience, have been prone to abuse. Thus, this SEA flatly prohibits the use of Title I funds to pay for any service which an earlier HEW audit challenged as a general aid violation--art, music, gym, home economics, band, guidance counselors, and nurses. The auditors had objected only to the participation of non-Title I children in these programs, not to the provision of such services to meet the identified needs of Title I children. The state over-reacted, however, due to lack of understanding of the audit findings, and fear of being "burned" again in the future.

The third category of state policies are designed to implement the educational philosophy of the SEAs. Examples of such state requirements supplementing the federal requirements include requirements that Title I funds be focused on a particular grade span (i.e., K-6, 7-9, 10-12), individualized instruction requirements, and minimum qualifications for all Title I paid staff.

It is our conclusion that SEAs should be allowed maximum discretion to develop policies which objectively define federal requirements and which further state policies within the basic framework of the Title I provisions.

To this end, OE should clarify by regulation the full range of legal program design options, including the circumstances under which specific components may be incorporated, so that SEA policies reflect educational choices, not generalized fear of audit exceptions.

IV. Recommendations

Consistent with our general findings and conclusions set forth above, we recommend that no fundamental changes be made in the existing Title I statute with respect to the LEA program requirements. The specific statutory and regulatory changes which we do recommend are described in Part III of a separate paper prepared by the Project entitled, "An Analysis of the Basis for and Clarity and Restrictiveness of the Program Requirements Applicable to Local School Districts Applying for Grants Under Title I of the Elementary and Secondary Education Act of 1965." [92]

We do, however, make three major recommendations concerning the United States Office of Education's administration of Title I. First, we recommend that OE include, under each substantive requirement set forth in regulations published in the Federal Register, illustrative examples of its application to commonly occuring situations. This technique is commonly used by other agencies for clarifying complex requirements. [93]

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[92] Specific recommendations concerning the administrative functions SEAs must perform are set forth in a separate paper prepared by the Project entitled "An Analysis of the Legal Framework for State Administration of Title I of the Elementary and Secondary Education Act of 1965". Specific recommendations concerning the relationship between Title I and selected state compensatory education programs are set forth in a third paper prepared by the Project entitled, "A Description and Analysis of the Relationship Between Title I, ESEA and Selected State Compensatory Education Programs".

[93] See, for example, regulations published by the Internal Revenue Service in Title 26 of the Code of Federal Regulations.

Second, a separate section entitled "interpretations," should be included in the regulations.[94] This section should be organized by subject area, rather than by requirement. Suggested headings include: teacher aides, support services, pull-out programs, in-class programs, desegregation, individualized instruction, inservice training, programs in open space schools, etc. The resolution of the problems arising in these areas often involves interpretation of a number of regulations. This section of the regulations should also include legal models illustrating the wide range of alternative program designs which are possible.

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[94] As explained supra, in accordance with the Education Amendments of 1976, Section 431 of the General Education Provisions Act now requires, among other things, that all "interpretations" be published in the Federal Register. In addition, Section 431 of the GEPA Statute presently requires that OE treat "interpretations" in the same manner as it treats substantive regulations with respect to publication in the Federal Register of a notice of proposed rulemaking, comment period, republication and submission to Congress. We recommend that Section 431 of GEPA be amended to require that OE "interpretations" simply be published in the Federal Register. OE should not be required to first publish their interpretations in proposed form subject to comments, republication and submission to Congress since, interpretations, unlike legislative rules, do not have the "full force and effect of law." Recall that a legislative rule implements the statute; whereas interpretations simply advise the public of the agency's construction of the statutes and rules which it administers. Moreover, application of burdensome procedures to interpretations discourages rather than encourages interpretation by OE when issues need clarification. Our recommendation that OE be required simply to publish its "interpretations" in the Federal Register and not follow the procedure applicable to other legislative rules is not exceptional in any sense of the word. OE "interpretations" would then be subject to the same procedures most other Federal agencies now follow under sections 552 and 553 of the Administrative Procedures Act (5 U.S.C. 552, 553).

It should be noted that we do not recommend that the language of the existing regulations be totally discarded and less legally-based language substituted.

The language of many of the regulations has been in existence for approximately eight years. Over time, most agencies have become familiar with these terms, although they may not always understand their precise implications or application. It is our opinion that less dissonance and more clarity would result from explaining the operative definitions, concepts, and standards set forth in present regulations than from totally revising the phraseology. Of course overly complex sentences in present regulations should be simplified. On several occasions such recommendations are made in our paper. We submit, however, that a complete revision would not be productive and would likely result in greater confusion than clarification.

Finally, we recommend that Congress require OE to prepare a policy manual for use by OE staff, HEWAA staff, SEAs, LEAs, and parents. The precedent for the development of a policy manual is firmly established in other agencies.[95]

The manual[96] should include, at a minimum (1) quotations of relevant sections of the Title I and GEPA statutes, (2) quotations of relevant regulations appearing in the Code of Federal Regulations, (3) explanations of the purpose of each requirement, with references to the legislative history, where relevant, (4) summaries of OE responses to SEA requests for interpretations, including examples of actual applications of the standards and operative definitions set forth in the regulations, (5) summaries of final decisions rendered by the HEW Audit Hearing Board, (6) final determinations made by OE concerning audits closed without reaching the Hearing Board, and (7) summaries of relevant court decrees.

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[95] For example, the Department of Housing and Urban Development has developed a manual explaining its Section 8 Housing Assistance program. Similarly, the Department of Labor developed a manual for administering the now repealed Welfare and Pension Plans Disclosure Act.

[96] It is our opinion that a mandate that OE prepare a manual would not be inconsistent with section 431 of GEPA, relating to publication in the Federal Register, (see supra.) so long as the following components of the proposed manual first appear in the Federal Register pursuant to the procedures of Section 431: (1) quotations of relevant regulations, (2) summaries of OE interpretations, and (3) examples of actual applications of the requirements in the regulations. The remaining components of the proposed manual, since they are not "rules, regulations, guidelines, interpretations, orders, or requirements of general applicability," need not be published in the Federal Register. Of course, Congress could also exempt specific components of a manual from the requirements of Section 431. We do, however, recommend that consistent with the Freedom of Information Act that OE publish in the Federal Register a notice that such a manual exists. (See 5 U.S.C. 552).

The manual should be organized by requirement _and_ by subject or topic areas, including, for example: "teacher aides," "support services," "pull-out programs," "in-class programs," "desegregation," "individualized instruction," "in-service training," "programs in open-space schools," etc. [97]

The manual should also explain the full range of alternative program design models which LEAs may pursue and, more important, describe the kinds of records they must maintain to leave a sufficient "audit trail" which HEWAA might follow. This latter section should be prepared jointly by OE and the HEWAA.

The suggestion that a manual be developed is based on the premise, described _supra_, that the Title I requirements are minimum process standards which do _not_ restrict innovative programs which are (1) of sufficient size, scope, and quality to ensure a reasonable promise of success, and (2) are designed to best meet the special educational needs of educationally deprived children. Several state manuals contain unnecessarily restrictive policies which limit LEA flexibility and go beyond the requirements of the federal legal framework.

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[97] OE should consider using the Table of Contents to Part III of our paper referred to _supra_, p.3 n. 11 which is attached as appendix A, as an outline for the proposed policy manual.

An OE manual explaining the full range of permissible program design options would help to eliminate the constraints on local discretion which result from uncertainty about Title I requirements, rather than educational choice, and would greatly facilitate compliance with the mandate set forth in Section 431 of GEPA that all regulations be uniformly applied and enforced throughout the country.

The OE correspondence we reviewed directly suggests the feasibility of developing a manual that includes interpretations that facilitate innovation and creativity rather than discourage it.

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